VOLUME III—Pages 645a-917a

No. 83-95

In the Supreme Court of the United States

October Term, 1983

ERNEST S. PATTON, Superintendent, SCI—CAMP HILL, and HARVEY BARTLE, III, Attorney General of the Commonwealth of Pennsylvania,

Petitioners,

v.

JON E. YOUNT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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FTS 722-6565
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Petition for Certiorari Filed June 29, 1983.
Certiorari Granted October 17, 1983.

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EXHIBIT P-1-y

July 10, 1969

THE COURIER-EXPR[ESS]

Clearfield, Elk and Jefferson Counties DuBois, PA., 15801, Thursday, July 10, 1969

YOUNT RULING BRINGS PROPOSED LEGISLATION

HARRISBURG (AP)—A Republican sponsored bill was introduced in the House Wednesday aimed at discouraging courts from refusing the admission of voluntary confessions because of legal technicalities.

Heading the list of co-sponsors was Minority Leader Lee A. Donaldson Jr., R-Allegheny, who said the bill was patterned after the 19... Federal Omnibus Crime Control and Safe Streets Act.

Donaldson cited a recent State Supreme Court decision which ordered a retrial for a high school teacher convicted of the rape-murder of a student.

The court ruled that the teacher's confession had been admitted as evidence wrongfully because he had not been advised of his right to free counsel, if he was unable to afford a lawyer.

Donaldson said his bill would require that a suspect be apprised of his constitutional rights, but that a court would not necessarily have to throw out a confession because of a slip-up.

"Where the confession is voluntary, the court may properly rule it admissible rather than mechanically reject it for want of technical compliance with a ...

EXHIBIT P-1-z

Sept. 8, 1969

DA REILLY TRYING TO STOP RETRIAL OF SLAYER YOUNT

Clearfield County District Attorney John K. Reilly Jr. says he has not given up the fight to stop the retrial of Jon E. Yount, convicted slayer of 18-year-old Pamela Sue Rimer of Luthersburg, RD.

Mr. Reilly was contacted after being notified that the Pennsylvania Supreme Court has turned down his petition to reargue a motion for a new trial before the court.

"We are of course very disappointed in the Supreme Court decision but we are now looking into other possible steps that can be taken" Mr. Reilly said.

When asked to elaborate on the statement, the district attorney explained he is now investigating the possibility of taking the case before the United States Supreme Court either through an appeal or an order of certiorari which would place the records of the case before the highest court for review.

This he indicated would be the last legal means of stopping the retrial of the former DuBois Area High School teacher who is presently serving a life sentence after being found guilty of first degree murder and rape.

If this should also be denied then Yount will be brought back to the Clearfield County for a retrial on the charges.

The district attorney said the new trial would probably be held at the first criminal court term following the U.S. Supreme Court decision.

The Pennsylvania Supreme Court granted Yount a new trial on a 4-1 decision on the basis that the former mathematics teacher had been denied his constitutional right as claimed by his attorney, Homer E. King of Pittsburgh...

technicality. In informing Yount of his rights at the time of his arrest the police and district attorney failed to tell him that he was entitled to a court-appointed free attorney if he could not afford to hire his own.

District Attorney Reilly admitted that no one had mentioned this because they were aware that the defendant was a high school teacher and apparently able to hire an attorney. However, defense attorney King argued there was no assurance a teacher's salary was sufficient to bear the costs of a long murder trial and the majority of the Pennsylvania Supreme Court justices agreed.

Mr. King was one of the two attorneys Mr. Yount hired to represent him. The other was David Blakely of DuBois.

Yount was convicted by a jury in 1966 of the murder and rape of Miss Rimer, one of his students in an accelerated math class. Reprint from Clearfield Progress.

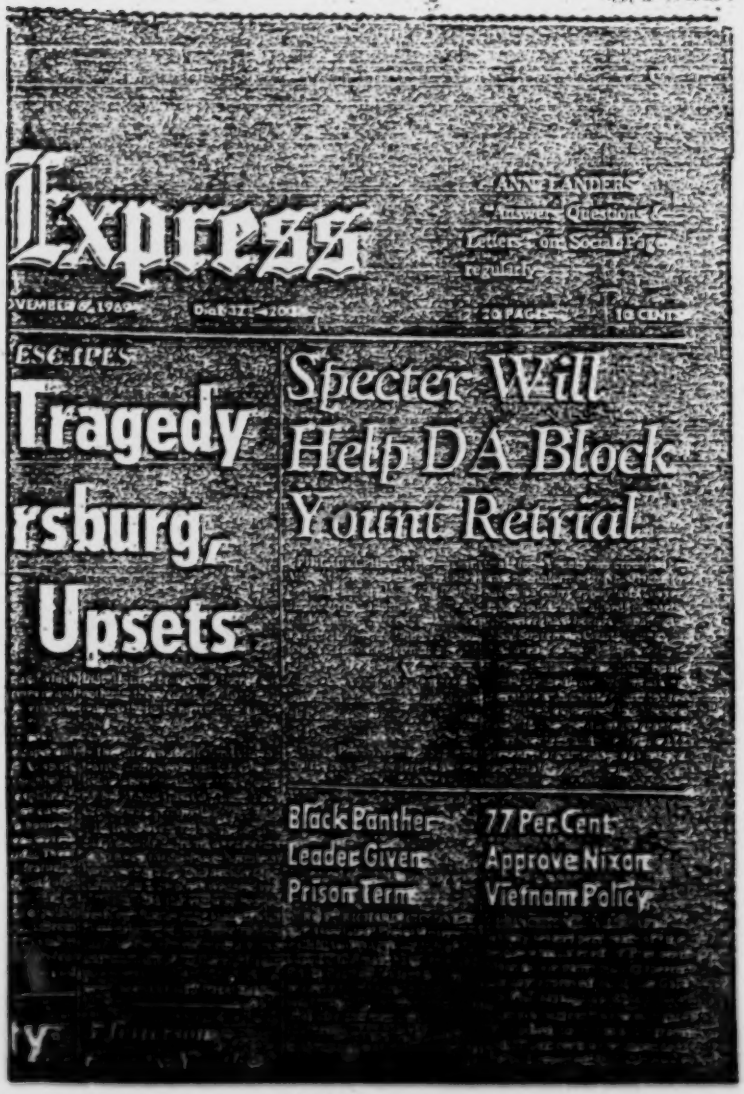
Exhibit P-1-aa

P1-aa

10-27-69

P1-66

Dec 6, 69


Express
ANN LANDERS
Answers Questions
Letters and Social Page
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Help DA Block
Yount Retrial
Black Panther
Leader Given
Prison Term
77 Per Cent
Approve Nixon
Vietnam Policy

EXHIBIT P-1-cc

Feb. 25, 1970

COURIER-EXPRESS

Counties DuBois, PA., 15801, Wednesday, February 25, 1970 Dial 371-4200

YOUNT GETTING NEW TRIAL

According to a news dispatch from Washington D. C. yesterday, it has been announced that the U.S. Supreme Court has refused to reverse a decision of the Pennsylvania Supreme Court which had ordered a new trial for Jon E. Yount, convicted of the murder and rape of 18-year-old Pamela Sue Rimer of Luthersburg, R.D. 1 in 1966.

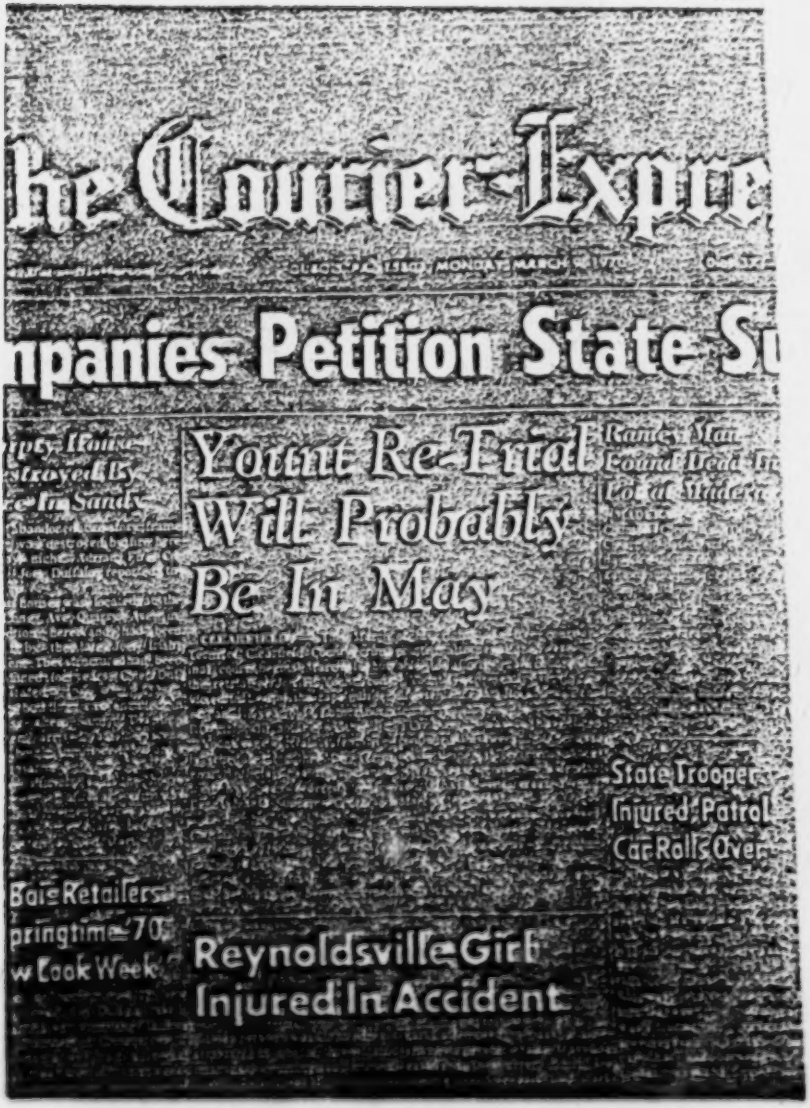
The State Supreme Court had ordered the new trial on the grounds that police had failed to advise Yount of his right to free counsel at the time of his arrest, voting 4-1 to grant the new trial on that technicality.

District Attorney John K. Reilly, Jr., of Clearfield County, when contacted, stated that his office had no information relative to the case but was endeavoring to secure it.

His office in connection with other legal authorities had filed a brief with the Supreme Court asking for a rehearing on the case.

P 1-dd

March 9, 1970



P1-ee

May 7, 1970

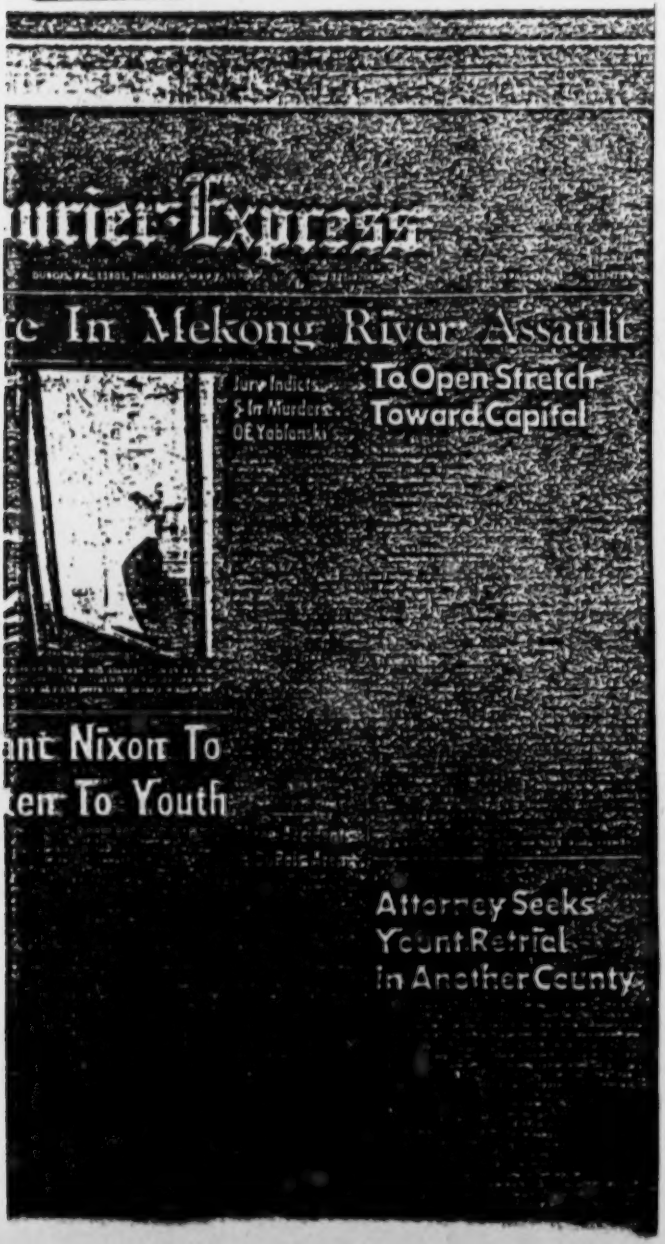


EXHIBIT P-1-ff

JUDGE GRANTS NEW DATE FOR YOUNT HEARING

Clearfield County President Judge John A. Cherry has granted a continuance in the hearing request on a change of venue and other matters relating to the re-trial of Jon E. Yount.

The hearing originally scheduled for May 15, was postponed until June 5th on the request of the defendant's counsel, seeking to have the re-trial moved to another county.

Exhibit P-1-gg

P1-99

Sept 22, 1970

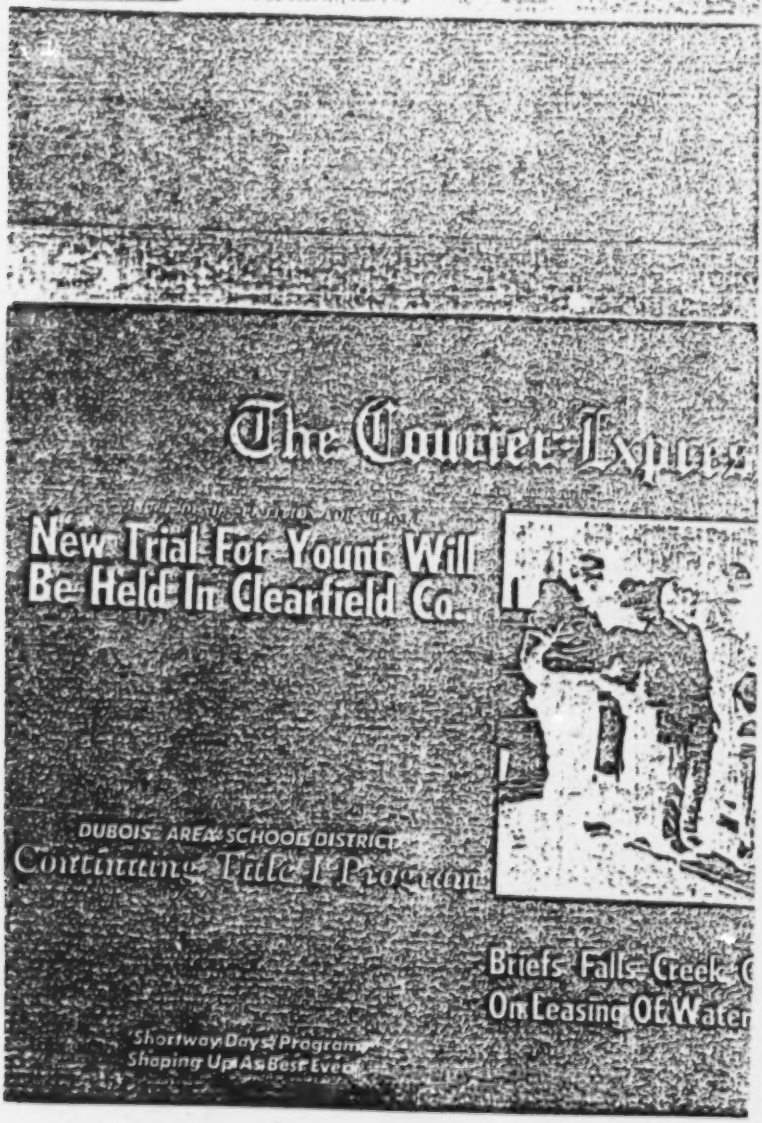


EXHIBIT P-1-hh

THE COURIER-EXPRE[SS]

Serving Clearfield, Elk and Jefferson Counties, DuBois, PA., 15801, Wednesday, Sept. 30, 1970

YOUNT RETRIAL SET NOVEMBER 2

CLEARFIELD—Nov. 2 has been set by Clearfield County Judge John A. Cherry for the retrial of Jon E. Yount, DuBois, convicted of first degree murder in the rape-slaying of 17-year-old Pamela Sue Rimer of Luthersburg RD, a high school...

EXHIBIT P-1-ii
Oct. 7, 1970

YOUNT TRIAL DATE CHANGED TO NOV. 4

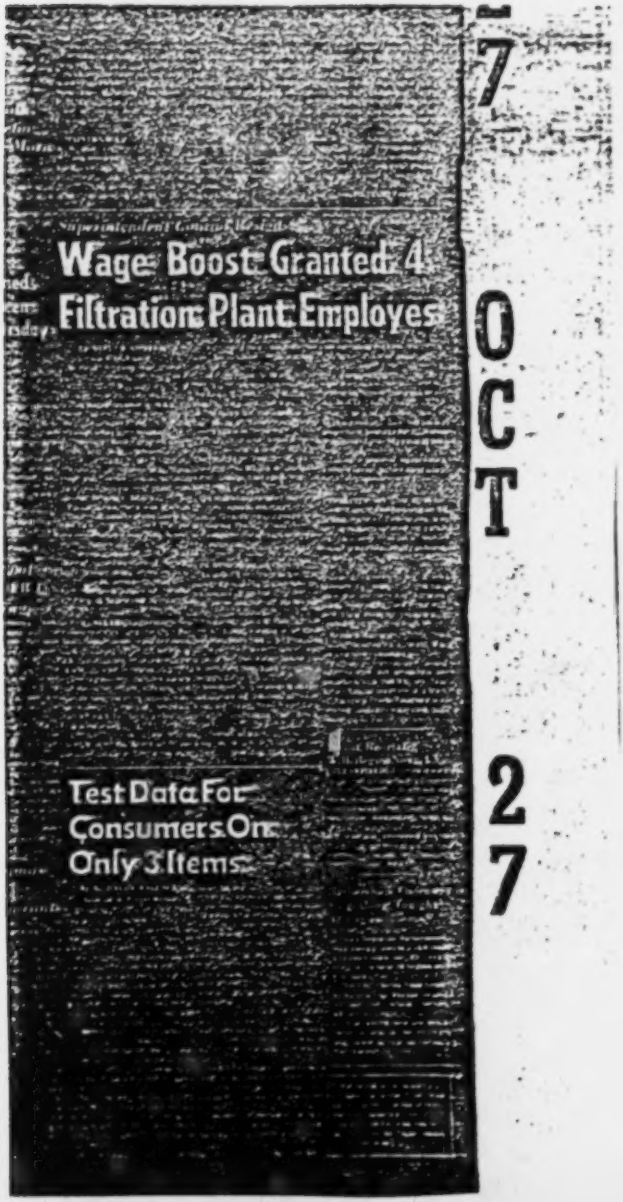
According to an announcement from the Clearfield County Court, the date of the beginning day of the Jon Yount trial originally scheduled for Monday, Nov. 2nd has been postponed until Wed., Nov. 4th.

All jurors and others involved have been notified to appear at 8:30 a.m. on Nov. 4th.

The move was made to permit those concerned with the trial to vote on Tues., Nov. 3rd at the General Elections.

P 1-jj

1970


Wage Boost Granted 4
Filtration Plant Employes
Test Data For
Consumers On
Only 3 Items
OCT
27

P-1-kk

NOV 3 1 1970

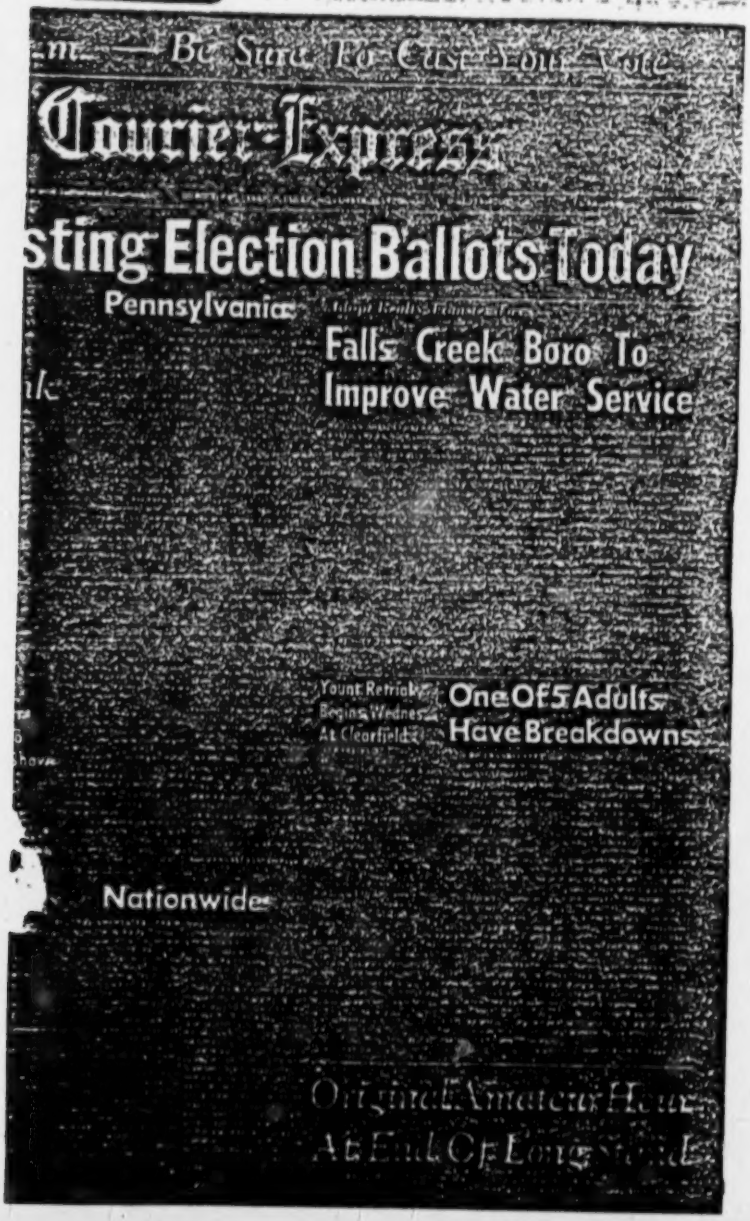


EXHIBIT P-1-ll
Nov. 4, 1970

YOUNT PLEADS NOT GUILTY, SELECTING JURORS

CLEARFIELD—Jon E. Yount, 32 of DuBois, RD, pled not guilty to the charges of the wilful murder of Pamela Sue Rimer, Luthersburg, on April 28, 1966, as the indictment was read in Clearfield County Court this morning, Judge John A. Cherry presiding.

Upon taking roll call of the jurors called for duty, it was discovered that three were absent. The judge issued bench warrants mandating their appearances. One was from Rockton, one from Fallen Timber and one from Coalport.

At presstime today, five jurors had been questioned, none seated. They were asked if they had formed an opinion in the case as the result of conversa-...

EXHIBIT P-1-mm
Nov. 5, 1970

... p.m. and receiving instructions from Clearfield County Judge John A. Cherry, Mr. Hoover was led to the jury room where he remained for the rest of the day, eating his lunch there—alone.

He was led to his quarters when court was recessed at 5:10 p.m. until 9 a.m. today to be ... room, one by one, after their name was called by the chief clerk after drawing the name from a box was Yount's chief attorney, Homer King of Pittsburgh.

—0—

BEFORE THE selection of jurors began, Judge Cherry deliver-

See SELECTING, Page 2

PROFILE OF DEFENDANT

By SHELLY SMOYER
Staff Writer

CLEARFIELD—He smiles, chuckles, and listens intently while his chief counselor, Homer King of Pittsburgh, questions prospective jurors.

> Jon E. Yount, formerly of DuBois, RD, now 32, sits beside his attorneys, a youthful looking man, clad in a dark fashionable suit, wearing a light blue shirt and dark tie.

His hair is cut in a conservative mod style, and he has earlobe length sideburns. He talks to his guards and court officials with whom he is is acquainted—but briefly.

Yount, a former mathematics teacher at DuBois Area Senior High School, is on trial for the murder of 18-year-old Pamela Sue Rimer of Luthersburg RD 1, one of his students, on April 28, 1966.

He has lost weight since that time and is now trim with a fine physique. He wears fashionable dark-

rimmed glasses with heavy lenses. Occasionally he takes them off and nibbles on an arm while listening to answers given by prospective jurors.

Yount wears a silver wedding band on the third finger of his right hand. At the time of his arrest in connection with the death of Miss Rimer, Yount was married and the father of two children.

—0—

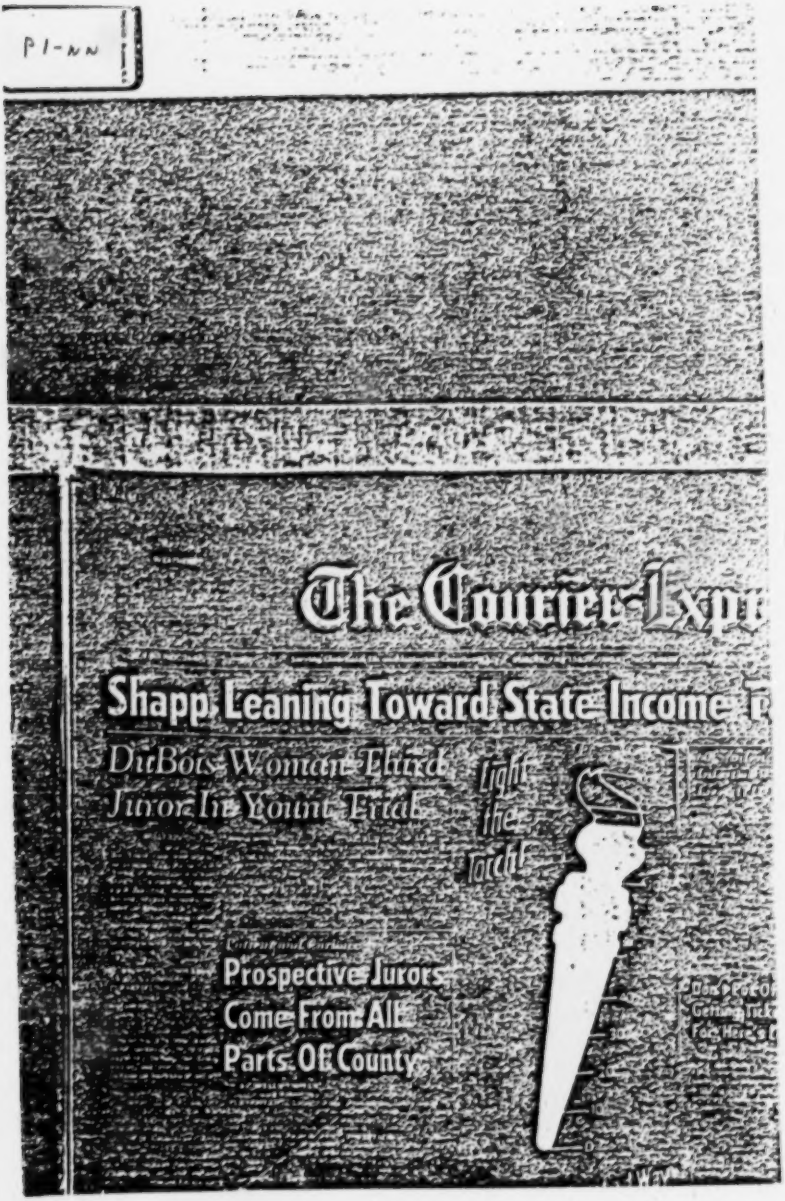
YOUNT WAS brought to Clearfield County Jail Oct. 13 from Rockview State Prison to stand trial. He is now confined to the county jail here.

Just a few spectators were on hand for the opening of the trial in the No. 1 Court Room here Wednesday.

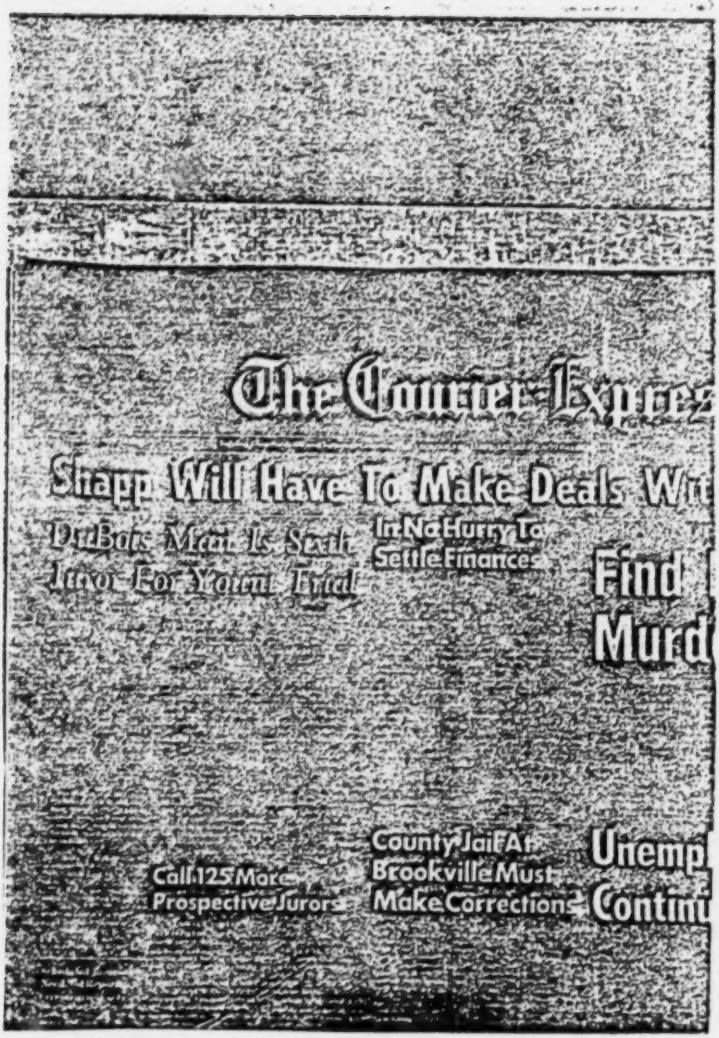
After the reading of the indictment by the chief court clerk charging him with the willful murder of Miss Rimer on April 28, 1966, Yount answered "Not Guilty" in a firm voice. He was backed by his

See PROFILE, Page 2

P1-NN


The Courier-Expr
Shapp Leaning Toward State Income
DuBois Woman Third
Juror In Young Trial
Light the torch!
Prospective Jurors
Come From All
Parts Of County

P1-00


The Courier-Expres
Shapp Will Have To Make Deals Wit
DuBois Meat Is Sixth
Juror For Yoder Trial
In No Hurry To
Settle Finances
Find
Murd
County Jail FAr
Brookville Must
Make Corrections
Unemp
Contin
Call 125 More
Prospective Jurors

P 1-PP

The Courier-Expres

DuBois Man Becomes 7th Juror For Yount Trial

Philipsburg Girl Miss Eccentric Northwestern Pennsylvania

Identifi As Esc

Student Charg With Slaying Clearfield Girl

Apollo 14 To Launch Pad

Supreme Court Refuses Wood Legality Suit

Soviet Space Program Making Strong Recovery

Patty Faust Of Brockway Picked First Runner-Up

State Police Investigate Accident

EXHIBIT P-1-qq
Nov. 10, 1970

DISMISS SECOND GROUP
QUESTIONING OF 35 PROSPECTIVE JURORS UNDERWAY

CLEARFIELD—Selection of a jury to hear the Jon E. Yount case continued today with no additional jurors picked at presstime.

Questioning of 35 jurors whose names were drawn as prescribed by law began at 10 a.m. this morning.

The names were drawn from the jury wheel Monday night, and those selected, were notified by the sheriff's office here.

Monday morning 125 jurors summoned by the sheriff's office over the weekend were on hand for call.

However, Yount's chief defense counsel, Homer W. King of Pittsburgh, objected to the manner in which they were picked.

While the prospective jurors were crowded into offices and a hallway at the rear of the courtroom here, legal arguments proceeded.

Deputy sheriffs and constables were summoned and questioned as to the manner in which the additional jurors were selected.

Following a lengthy consultation of counsels with Judge John A. Cherry after the questioning of deputies and constables, Judge Cherry sustained King's objection.

The prospective jurors were dismissed and reimbursed for their trouble. Selection of additional jurors via the jury ... more are needed – five regular and one alternate.

After a jury is chosen, Yount, formerly of DuBois, RD, will be tried on a charge of murder in connection with the death of Pamela Sue Rimer, 18 of Luthersburg RD 1, whose body was found near her Brady Twp. home April 28, 1966.

Exhibit P-1-rr

P 1-rr

Joy In Chucktown ... Beaver's Triumph In

The Courier-Express

Explosion Kills 10 Members Of Firm Crew

10 Jurors Have Been Seated In Yount Trial

Believe Dead Man Is One Of 2 Who Escaped

Veterans Must Cont Heart And Strength

France Says Goodby To De Gaulle

Brockway Area School Board Hears Reports

EXHIBIT P-1-ss

THE COURIER-EXP[RESS]

Serving Clearfield, Elk and Jefferson Counties DuBois, PA., 15801, Friday, November 13, 197[0]

YOUNT JURY NEARLY COMPLETE, NEED 2 ALTERNATES

CLEARFIELD—The Jon E. Yount murder trial could conceivably begin Saturday.

Selection of two alternate jurors was under way today after the final two regular jurors were seated Thursday, one of whom is from DuBois.

Juror No. 11 is Robert P. Murphy, 514 W. Washington Ave., DuBois, business manager at the DuBois Campus of Pennsylvania State University. He is married and the father of a daughter, a senior at DuBois Area Senior ...

EXHIBIT P-1-tt

THE COURIER-EXPR[ESS]

Clearfield, Elk and Jefferson Counties DuBois, PA., 15801, Saturday, Nov. 14, 1970

DEATH IN FAMILY EXCUSES WOMAN FROM YOUNT JURY

CLEARFIELD—Selection of the Jon E. Yount murder trial jury ground to a halt late Friday morning

when a juror already chosen was excused because of a death in her family.

Mrs. Katherine Spehalski, DuBois, Juror No. 3, chosen Friday, Nov. 6, was excused by the court because of the death of her younger sister, Mrs. Josephine Brunswick, DuBois, who died Friday.

During the selection of jurors Friday morning, the list of prospective jurors was exhausted. Chief Defense Counsel Homer E. King of Pittsburgh then petitioned for a change of venue (change of county), saying a jury could not be seated in Clearfield County.

The afternoon session was taken up by legal argument on the petition and a legal question of additional preemptory challenges because of the excusing of Mrs. Spehalski.

The defense has used up all the preemptory challenges. Late Friday afternoon, the petition for change of venue was denied and an order given for the drawing of additional prospective jurors.

The sheriff's office late this morning was rounding up 13 prospective jurors chosen via the jury wheel and the court was awaiting their arrival to continue questioning of jurors.

With the excusing of Mrs. Spehalski, a widow, a replacement and two alternates are needed...

EXHIBIT P-1-uu

[TH]E COURIER-EXPRESS

[Cle]arfield, Elk and Jefferson Counties DuBois, PA., 15801, Monday, Nov. 16, 1970

SELECTION OF YOUNT JURY ENTERS 11TH DAY

CLEARFIELD – Selection of a jury for the Jon E. Yount murder trial entered its 11th day with one juror and two alternates still needed.

Fifteen additional jurors were summoned Saturday when the list of those drawn last week were exhausted. They began arriving Saturday afternoon but none were chosen.

Court resumed this morning with questioning of those prospective jurors drawn Saturday.

Selection of a jury to hear testimony in the case was complicated Friday afternoon when Juror No. 3, Mrs. Katherine Spehalski of DuBois, was excused because of the unexpected death of her youngest sister.

Also, on Friday, the defense counsel petitioned for a change of venue which was denied by the court Saturday. Following the ruling the court ordered 15 more prospective jurors drawn from the jury wheel.

Yount, formerly of DuBois, is charged with murder in the April 28, 1966 death of Pamel Sue Rimer, 18, Luthersburg RD...

EXHIBIT P-1-vv

[THE COURIER]-EXPRESS

15801, Tuesday, Nov. 17, 1970 Dial 371-4200 12 Pages 10 Cents

JURY OF 8 MEN AND 4 WOMEN

YOUNT TRIAL BEGINS

CLEARFIELD—A jury of eight men and four women began hearing testimony in the Yount murder trial when Clearfield County Crimnal Court convened at 9 this morning.

After 11 days, the jury and two alternates to hear the case was selected. The final alternate juror was selected at 3:30 p.m. Monday.

The regular jury consists of Blair Hoover, Morrisdale RD; Clair Clapsaddle, Grampian RD; John T. Harchak, Morann, John Yorke, Houtzdale; Mrs. Mary Jane Waple, Bigler; James F. Hrin, DuBois; Martin R. Karetski, DuBois; Mrs. Julia Hummel, Clearfield; Mrs. Jessie Parks, Clearfield; Albert I. Undercoffer, Clearfield; Robert P. Murphy, DuBois, and Mrs. Irene Kurtz, Mahaffey.

The alternates are David J. Chincharick, Ginter and Mrs. Laverne B. Trott, Burnside. Mrs. Trott was the final juror to be chosen.

Mr. Harchak replaces Mrs. Katherine Spehalski, DuBois, Juror No. 3 who was excused from jury duty Friday because of the death of her youngest sister.

Jon E. Yount, 32, is charged with murder in the death of Pamela Sue Rimer, 18, Luthersburg RD 1,

April 28, 1966. He is being represented by Homer W. King and Francis Sabino, Pittsburgh and David E. Blakely, DuBois.

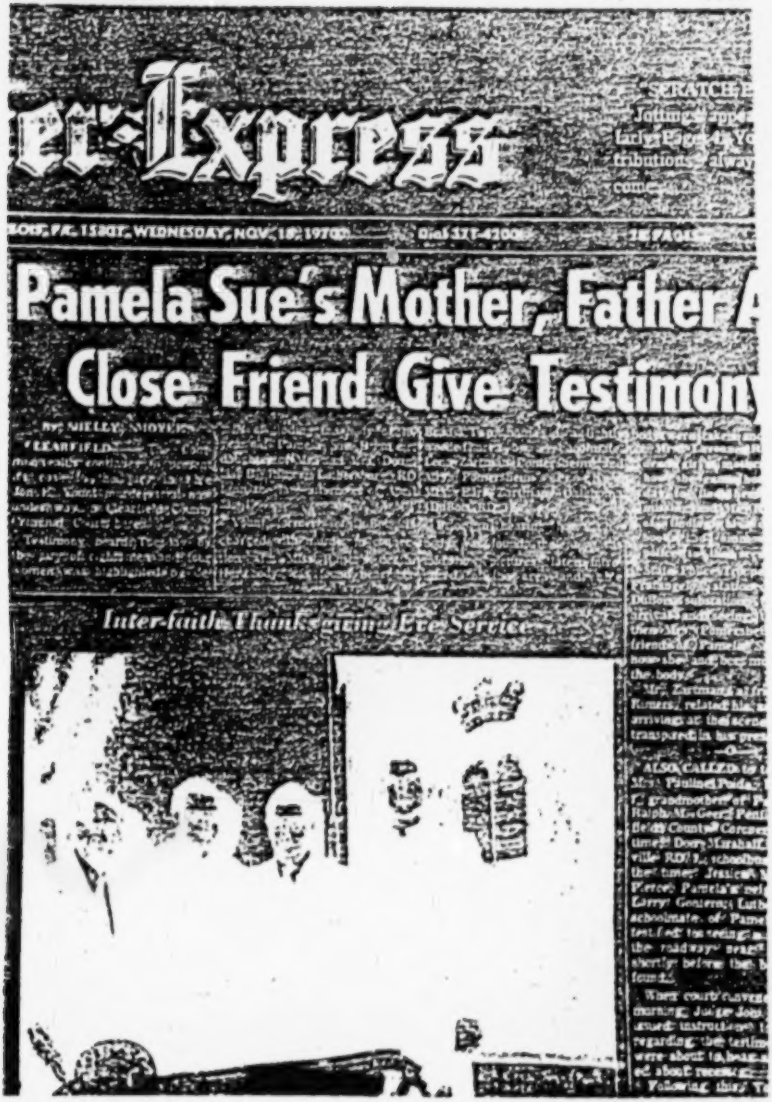
The Commonwealth is being represented by Clearfield County District Attorney John K. Reilly and Assistant DA Ervin Fennell of DuBois.

The regular jury panel and the two alternates will be shut off from the outside world until the trial is completed. If for some reason a regular juror cannot continue to serve, an alternate will take his or her place in the jury box.

Otherwise, the two alternates will be dismissed at the time the case is turned over to the jury for a verdict.

After opening remarks, the Commonwealth will begin presenting its case. Chief prosecution witness is State Police Trooper Donald E. Bedford of the DuBois State Police substation.

P1-ww



Express

SCRATCH

WEDNESDAY, NOV. 18, 1970

Pamela Sue's Mother, Father A

Close Friend Give Testimon

Inter-faith Thanksgiving Eve Service

P1-xx

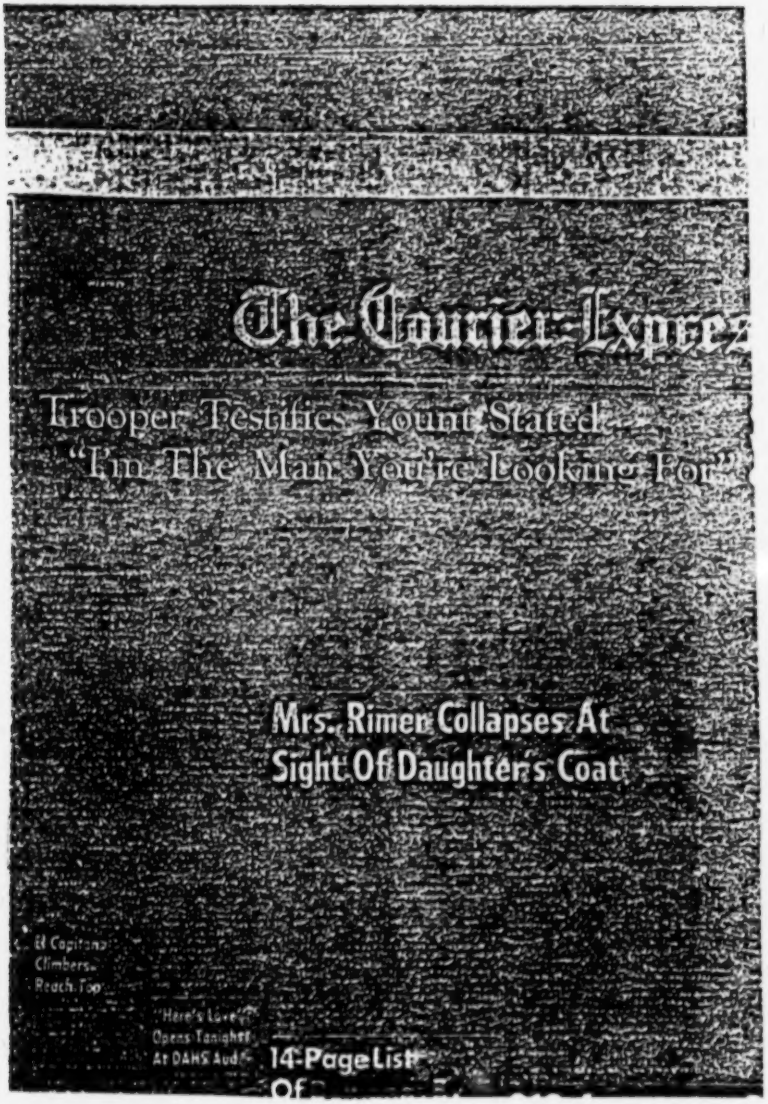

The Courier-Expres
Trooper Testifies Yount Stated
"I'm The Man You're Looking For"
Mrs. Rimer Collapses At
Sight Of Daughter's Coat
El Capitan
Climbers
Reach Top
Here's Love
Opens Tonight
At DAHS Aud
14-Page List
Of

EXHIBIT P-1-yy
Nov. 20, 1970

... Yount murder case, this afternoon after hearing over two and a half days of testimony.

The jury was locked up in the jury room of the courthouse here after hearing closing remarks by Chief Defense Counsel Homer W. King of Pittsburgh and District Attorney John K. Reilly for the Commonwealth, and explicit instructions from Judge John A. Cherry.

> All testimony was concluded at 3:43 p.m. Thursday. The state rested its case at 1:55 p.m. Following a 15 minute recess the defense gave its opening remarks.

At 3:43 p.m. the defense rested its case. This was after 16 reputation witnesses had appeared and stated Yount, formerly of DuBois, RD 2, had a "very good" reputation prior to April 28, 1966.

Judge Cherry recessed court at 3:43 p.m. until 8:30 a.m. today ... jury entered the jury room.

In his opening remarks Mr. King reminded the jury that they must hear all evidence and take all evidence into consideration when considering the case. He reminded the jurors of the opening instructions of the judge ...

This, Attorney King explained, is a man's reputation, how he is known to his family, friends, and associates in his community, and his character.

He urged the jury to hear and weigh all the evidence.

Then he began calling 16 repu-...

DEFENSE TAKES ONLY ... HOUR TO PRESENT ... 16 REPUTATION WITN[ESSES] ...

By SHELLY SMOYER

CLEARFIELD—The Commonwealth ended its case against Jon E. Yount, 32, formerly of DuBois, RD 2, charged with murder in the April 28, 1966 death of Pamela Sue Rimer, 18, Luthersburg, RD, early Thursday afternoon by putting Yount's station wagon at the scene of the crime.

Thursday's testimony stated Yount was the owner of a blue-green 1961 Rambler station wagon seen in the vicinity of the Rimer home in the late afternoon of April 28, 1966.

The state produced physical evidence linking the vehicle to the crime and offered testimony that it was at the scene of the crime.

—0—

STATE POLICE Trooper Bernard Gorman, stationed at Punxsutawney at the time in question, corroborated State Police Detective Edward Kerr's statements about returning to the DuBois substation the night of April 28 from the scene.

Then Trooper Gorman testified he returned to the DuBois substation at 6 a.m. April 29, while being on assignment to check out the vehicle being sought in connection with the crime.

There he was assigned by Detective Kerr to get a search warrant for the vehicle, he stated. He obtained the warrant and located the vehicle in question at the home of the defendant's parents in DuBois, R.D. 2, the policeman testified.

He stated the vehicle was searched by Criminal ... that a school teacher by the name of Jon Yount owned a vehicle of the type being sought.

State Police Corporal John W. Magus was recalled and stated he made plaster of paris casts of a tire print in a ditch bordering the red dog road near the Rimer Home where tire tracks went into the clover and alfalfa field.

A wheel with a common snow tread on it, purported to be the rear wheel of the vehicle in question along with the casts were identified by Corporal Magus.

He stated the tread pattern of the tire and in the casts were similar. Also introduced was a portion of a sapling on which appeared apparent blood stains. This sapling was slightly above where the body was found.

Corporal Magus explained he took soil samples from the red dog road, then identified a sneaker found under the body when it was rolled over for photographs.

Under cross-examination, Corporal Magus testified he couldn't find any finger prints of the deceased in the station wagon ...

P 1-22

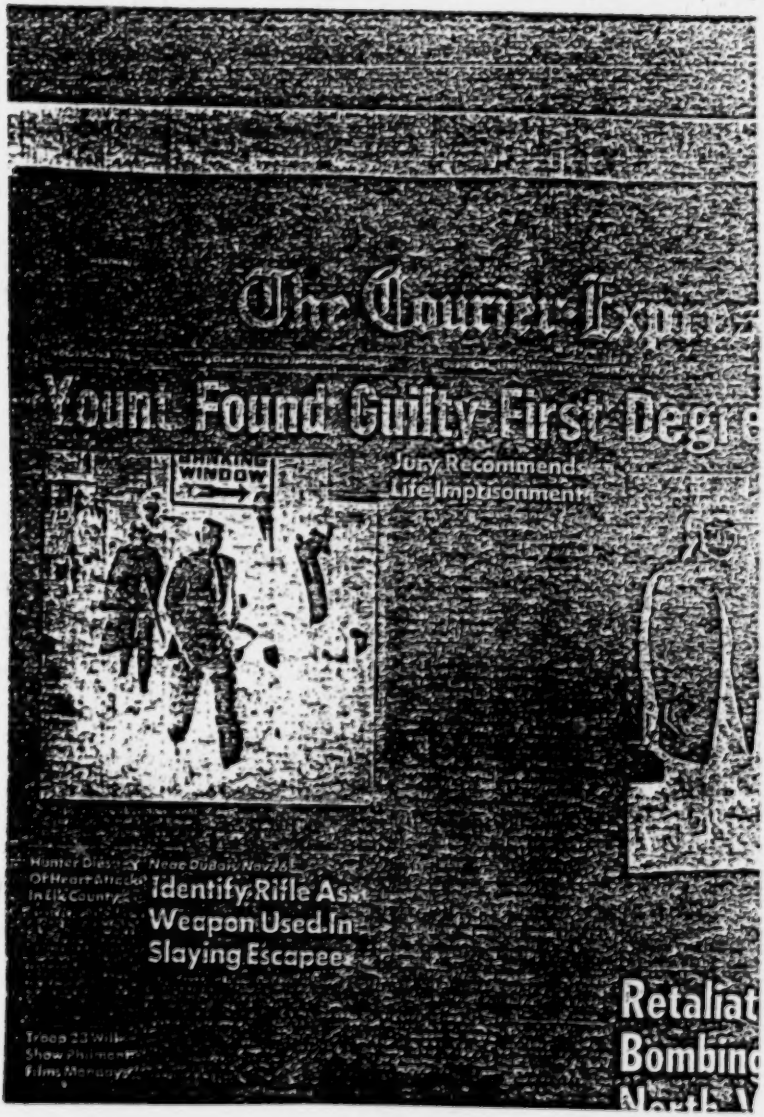

The Courier-Expr
Found Guilty First Degr
Jury Recommends
Life Imprisonment
BANKING
WINDOW
Identify Rifle As
Weapon Used In
Slaying Escapee
Retaliat
Bombinc

EXHIBIT P-1-aaa
Nov. 23, 1970

YOUNT SENTENCING SLATED NOV. 30

CLEARFIELD—Jon E. Yount, 32, formerly of DuBois RD 2, convicted of murder in the first degree in a re-trial concluded Friday, will be formally sentenced by Judge John A. Cherry at 9 a.m. Monday, Nov. 30.

After finding Yount guilty of murder in the first degree, the jury of eight men and four women recommended life imprisonment, ending Yount's second bid for freedom.

Following the verdict, Yount was returned to the Clearfield County Jail to await formal sentencing. Sentencing was delayed to permit Yount's counsel to decide whether to appeal the verdict.

[Y]ount was charged with murder in the April 28, 1966 death of 18-year-old Pamela Sue Rimer of Luthersburg RD 1.

P1-111

Dec 1 1970

The Courier-Expr

Total Population Of U.S. Is 20

Yount's Counsel Files For Third Trial

16 Reasons Sentencing Postponed

Brockway Man Newest Member Of State Game Commission

EXHIBIT P-1-bbb-2
Dec. 1, 1970

YOUNT'S COUNSE[L] ...
16 REASONS, SENTENCING POSTPONED

CLEARFIELD—Attorney Homer W. King of Pittsburgh, chief defense counsel for Jon E. Yount, 32, formerly of DuBois, RD 2, twice convicted of the murder of 18-year-old Pamela Sue Rimer, Luthersburg, RD 1, has petitioned Clearfield County Court for a third trial.

The latest legal maneuver by Yount's attorney last Friday postponed the scheduled formal sentencing of Yount indefinitely until the court decides the matter of another new trial.

Yount was to have been sentenced Monday morning by Clearfield County Judge John A. Cherry after he was found guilty of first degree murder by a jury following a re-trial in November. The jury fixed the penalty at life imprisonment.

Instead, he was ordered returned to Rockview Penitentiary at once. Yount has been held in the Clearfield County Jail here since mid-October.

In his motion for a new trial, Attorney King cited 16 reasons. He also petitioned the court to grant him the right to state specific grounds in support of the motion after the record of the trial has been transcribed.

Thirteen of his points in support of the new trial were leveled against the conduct of the court during

the trial. The other three claimed the verdict "was against the evidence", "against the weight of the evidence" and "against the law."

King charged Judge Cherry with erring in failing to grant a change of venue. He also cited the judge's actions and remarks during the selection of jury and the trial itself.

King said the court should have suppressed such evidence as that pertaining to the defendant's ...

EXHIBIT P-1-ccc

10/6/81 DuBois Courier-Express Page 2

YOUNT CHALLENGING STATE CONVICTION IN FEDERAL COURT

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Yount is challenging his state conviction in federal court, Mr. Morgan said. A hearing on the petition will take place Nov. 3 in Pittsburgh. The district attorney's office will be represented at the hearing.

The state pardons board is still considering Yount's annual automatic petition for parole for life. A hearing before the board took place in June.

The board has not yet handed down a decision.

EXHIBIT P-1-ddd

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WILL OPPOSE YOUNT PETITION AT NOV. 3 HEARING

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The hearing on the petition takes place at 10 a.m. Nov. 3 before Magistrate Robert C. Mitchell is U.S. District Court for the Western District of Pennsylvania.

Yount was convicted in 1966 and 1970 of the murder of Pamela Sue Rimer of Luthersburg, a student at DuBois Area Senior High School.

He is challenging his state conviction in federal court. He claims his statement to police were taken in violation of his Miranda rights, his right to empanel a fair jury was violated because of prejudicial media accounts, the jury was improperly charged, and his counsel was ineffective, according to Mr. Bell. conviction in federal court. He

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Will Oppose...

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The petition was filed this spring. A federal public defender has been appointed by the court. The district attorney will raise objections to some of Yount's claims, according to a statement from Bell.

The state pardons board is still considering Yount's eighth petition for life on parole. A hearing took place in June.

EXHIBIT P-1-eee

INSIGNE
By
GEORGE WAYLONIS

The Jon Yount Story, apparently, is not over.

In addition to the appeals filed by his defense attorneys, it appears that psychiatrists and psychologists are going to take a long, academic look at this model school-teacher who suddenly plunged to violence.

This reporter believes that within a few years there will be technical articles written on the split personality of Jon Yount. These will be written for the journals of psychiatry.

The Courier-Express continually receives inquiries from professional men wanting material which was published in this newspaper. And these requests come from persons who do not have a delight in tragedy, or

a morbid interest in what unfolded on that lonely country road in Brady twp. last April.

The defendant in the celebrated murder trial was examined by two groups of psychiatrists and psychologists. Much of their conclusions will never be released because material of this nature is of a confidential nature. Only that revealed in open court is available to the general public.

The findings of the medical team at Warren State Hospital, where Yount was first examined, will remain highly confidential. State institutions have a strict rule regarding such information. In fact, during the trial, these medical men told the defense attorney they had more information they could place on the record. After hearing this, the defense decided not to quiz these witnesses any further.

But "civilian" medical men at Pittsburgh also conducted examinations. What they will eventually do with their findings is open to speculation. These men were and are deeply stimulated, professionally, by what they learned about Jon E. Yount.

And this is understandable. For the principals came from good homes, and had had opportunities for the good life.

> It is this reporter's belief that someday a book or a portion of a book, will be written about The Jon E. Yount Story.

This is more credible today, what with the financial success that is enjoyed by "In Cold Blood" a documentary of the mass killings of a family in Kansas. Writer Truman Capote has pioneered a new type of documentation that, undoubtedly, other writers will copy.

EXHIBIT P-1-fff

DA RECEIVING LETTERS OPPOSING RELEASE OF YOUNT

CLEARFIELD – The district attorney's office here says letters opposing the release of Jon Yount from prison will be forwarded to the state Board of Pardons in Harrisburg.

Yount, twice-convicted murderer, has made his eighth bid for clemency. He has applied to the state Board of Pardons to have his life sentence commuted to life on parole.

Letters opposing the release are to be sent to: Clearfield County District Attorney, P.O. Box 887, 231 E. Market St., Clearfield, 16830.

A hearing on the 43-year-old former DuBois math teacher's appeal will take place during June in Pittsburgh. A representative of the district attorney's office will present arguments opposing the sentence commutation at that time.

EXHIBIT P-1-ggg

YOUNT TRYING FOR PAROLE EIGHTH TIME

Jon Yount, twice-convicted murderer formerly of DuBois, will try for the eighth time to have his life sentence commuted to life on parole.

The Clearfield County District Attorney's Office learned Monday of Yount's latest automatic appeal. He is entitled to one appeal a year, the office spokeswoman explains.

His last appeal was heard on Nov. 20 in Pittsburgh. The appeal was turned down by the state Board of Pardons early this year, it is noted.

The latest appeal will be heard in Pittsburgh during June. The DA's office will be represented at the arguments.

Mr. Yount, who has spent the past 14 years behind bars, was convicted in 1966 and again in 1970 of the first degree murder of his high school math student, 18-year-old Pamela Sue Rimer of Luthersburg RD 1. He was a former DuBois Area Senior High School math teacher.

He has been imprisoned since the morning after the April 1966 slaying when he presented himself to DuBois State Police.

He is currently incarcerated in the State Corrections Institute at Camp Hill.

PLAINTIFF'S EXHIBIT NO. 5

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 81-234

Jon E. Yount,

Petitioner,

vs.

Harvey Bartle, III, Attorney General of Pennsylvania,
Respondent.

Transcript of Proceedings of continued evidentiary hearing in the above-entitled action held on December 28, 1981, before Robert Mitchell, United States Magistrate.

Appearances:

For the Petitioner [sic]: F. Cortez Bell, III, Assistant District Attorney, Clearfield County, P. O. Box 887, Clearfield, Pa. 16830.

For the Respondent [sic]: George E. Schumacher, 590 Centre City Tower, 650 Smithfield Street, Pittsburgh, Pa. 15222.

[2] (The following proceedings were held beginning at 10:30 a.m., on December 28, 1981, before Robert Mitchell, United States Magistrate, Pittsburgh, Pennsylvania.)

THE COURT: This is the continued evidentiary hearing in the case of Jon Yount vs. Harvey Bartle III, et al., Civil Action 81-234.

Sir, you are Mr. Yount?

THE DEFENDANT: Yes.

THE COURT: You are represented by Mr. Schumacher?

THE DEFENDANT: Yes, your Honor.

THE COURT: Mr. Bell, you are representing the Commonwealth?

MR. BELL: Yes, your Honor.

THE COURT: I scheduled this hearing, I will note for the record, over the opposition of the petitioner to any further evidence being taken. Nevertheless, it is my opinion that although it might have been more convenient to take the testimony at the first hearing, there is certainly no delay here and we are still within our briefing schedule we set at the last hearing. I should also indicate since we have last met I have read the entire voir dire transcript word for word. Just so everybody knows, I have read it. Mr. Bell, you requested the hearings. Do you want to proceed?

[3] MR. BELL: Thank you very much, your Honor. At this time I call Judge John Cherry to the stand.

JOHN A. CHERRY being first duly sworn, testified as follows:

BY MR. BELL:

Q. Would you please state your name for the record?

A. John A. Cherry.

Q. And what is your occupation currently?

A. Common Pleas judge, senior judge, retired.

Q. Judge Cherry, were you also the judge with regard to the two trials involving Commonwealth of Pennsylvania vs. John Yount?

A. I was.

Q. It is my understanding one trial occurred in 1966 and one occurred in 1970. Is that correct?

A. Within my recollection, yes. It was a period of some two or three years, perhaps four, after the first one.

Q. All right. During those two trials, where did those two trials take place?

A. In Clearfield County.

Q. At the time of the trials what was your position at that time?

A. I was the president judge. In fact, I was the [4] only judge in the county. It is a one-judge county at the present time yet.

Q. Judge Cherry, just briefly to your qualifications prior to becoming a judge, did you attend law school?

A. I did. I graduated from the University of Michigan. From there I went to the law school at Dickinson School of Law in Carlisle, graduated in 1936 and practiced until 1963.

Q. And is that the time when you were first elected judge?

A. That is correct. I assumed office on the 7th of January 1964.

Q. Now, Judge Cherry, I assume during the course of your practice you were also admitted before the various courts of the Commonwealth of Pennsylvania?

A. I was.

Q. Judge Cherry, directing your attention first of all to the first trial and the circumstances surrounding the first trial, do you have any recollections as to any newspaper accounts or publicity as to the first trial in the press?

A. Well, I don't believe that I could give you detail for detail, but I do recall that there were presented various items by counsel for the defendant.

[5] Q. What were the nature of those?

A. Just a minute. I would like to add one thing. It was always my practice not only to instruct the jury to do so, but I did myself refrain from reading any articles concerning my cases, large or small.

Q. Now, you have indicated you did instruct that particular jury not to read any articles, is that so?

A. I did so. Almost every recess, if not every recess. The record would have to be viewed for that. I have not read the record.

Q. O.K. At any point did you ever have occasion to give the press any instructions as to what their role should be?

A. Oh, yes, I did.

Q. Could you please relate for the Court what if anything occurred?

A. I told them to be very careful not to offer any opinions and not to write anything that would be detrimental to the interests of the defendant in any respect. They were allowed to relate what would have been or what would be later testified to.

Q. Now, with regard to the conduct of the first trial in particular, Mr. King has testified here previously before this Court with regard to the conduct of the spectators within the courtroom in that they applauded and [6] booed, et cetera. Do you have any recollection as to the conduct of any spectators during the first trial?

A. I do not.

Q. Do you have any knowledge as to whether anyone ever was unruly, applauded, booed, et cetera?

A. Certainly not in my recollection, and I am quite sure that would appear of record, because I certainly would have taken care of the situation and directed them not to engage in that. I might add, however, that the mother and father both I think broke down in court.

Q. Of the victim?

A. Yes, but a recess was immediately called and the record would have to show that also.

Q. Now, Judge Cherry, as a result of the first trial, a conviction was gained, and Mr. King testified Mr. Yount was immediately sentenced that very same day when the verdict was returned. Do you have any recollection as to when he was sentenced?

A. I did not think it was immediately. I don't believe it would have been too long after the period for filing motions would pass.

Q. The post-trial motions?

A. The post-trial motions.

Q. And were to your knowledge post-trial motions filed with regard to the first trial?

[7] A. Oh, definitely.

Q. Now, during the course of the first trial do you have any recollection, as to the number of spectators within the courtroom, outside of the courtroom, et cetera?

A. I made no record at that time. That was near the commencement of my ten years in office. I didn't quite get to the point where I got later, but I would say that there were a number of people in the courtroom, yes, in the first trial.

Q. Now, Judge Cherry, I believe the first conviction was appealed up through the court system, et cetera, is that correct?

A. That is correct.

Q. And as a result of that, a second trial was necessary?

A. Yes. It was reversed on the basis that certain portion of his confession was allowed in, and of course it was reversed on that basis.

Q. As a result of the Miranda decision?

A. The Miranda decision. A portion of the confession was kept in because it was held to be before there was any thought of an arrest of the individual.

Q. Now, Judge Cherry, turning our thoughts for a moment to the second trial with regard to the Commonwealth of Pennsylvania vs. John Yount, at any point were a change [8] of venue motions presented to the Court by the defense counsel, Mr. King?

A. Oh, yes.

Q. Do you happen to recall on how many occasions those occurred?

A. It was quite a number of times. I don't remember how many.

Q. Did these occur during voir dire mainly or during the course of trial?

A. Prior to trial, during the voir dire, and after. After that would have been a motion for mistrial on various occurrences during trial.

Q. But you do recollect that there were a number of motions filed?

A. Yes, there were.

Q. With regard to each one of those motions did you consider those motions separately on each occasion they were presented?

A. I did.

Q. Could you relate to the Court what if anything occurred with regard to these motions once they were raised to the Court?

A. They were denied. They were refused. Whenever I was asked to review something, I did it, and I certainly determined that it was not any detrimental effect to the [9] defendant.

Q. Now, Judge Cherry, you were present also I assume during the voir dire of the second trial, is that correct?

A. Oh, yes.

Q. You heard all the questions asked of the various persons?

A. Yes.

Q. Now, Mr. King testified at our previous hearing at that one point an indication had been made to him that if you did not get the panel within this one group of jurors that his motion for change of venue would be granted. Do you have any recollection as to that?

A. I certainly do not.

Q. Do you believe that you made indication such as that?

A. I do not.

Q. Now, I believe that several panels were gone through during the course of the second jury selection, is that correct?

A. Yes.

Q. Do you have any recollection as to the number of panels that were called or the means by which those panels were obtained?

A. I am sorry, I don't. Possibly two or three. [10] At least two, but I would think three.

Q. Now, at any point during the voir dire examination was that open to the public or was the courtroom closed, or do you have any recollection?

A. My recollection is that it was not closed.

Q. What about during the course of trial? At any point was the second trial closed to the public?

A. Oh, never. I don't believe in either trial. Never was it closed.

Q. Were any precautions taken during the course of any one of the trials with regard to spectators that might enter?

A. Yes. Prior to the first trial there had been an indication that a member of the family had made serious threats against the defendant and it had been called to my attention, and of course I asked the sheriff and his deputies to be very careful to observe, and in cases where they thought it proper and necessary, to search individuals. I can't recall ever having a report that they were searched.

Q. Is that a standard precaution that you would use in a case such as this?

A. Oh, my, yes. I did in every murder case.

Q. Approximately how many murder cases have you presided over?

[11] A. I suppose ten. At that time it would only have been four on the second trial. The first trial, it would have been two, I think.

Q. Now, at any point during the course of jury selection did you of your own motion cease jury selection for any reason, to your knowledge?

A. I would believe that would be on the record. I do not recollect, but if it occurred, it would certainly be on the record.

Q. Once again with regard to the second trial and the voir dire, do you have any knowledge or information with regard to the number of spectators present in the courtroom throughout either one of those proceedings?

A. There were quite a few people during the course of the first trial. Students would come in after the school let out and they would jam the courtroom. Some of the courthouse personnel would be up there at coffee breaks or what not, but at the second trial there were very, very few spectators. By that time I was making notes occasionally in my rough notes that I took, and I took and I still do take very voluminous notes in the trial and I would make notes occasionally of how many people were there. I did for your purposes look over the notes of the second trial, my notes, and I noted on the first day that outside of court personnel, there were only about three people, [12] three spectators other than family or witnesses.

Q. That is—

A. Of course witnesses were segregated and they only remained in the courtroom after their testimony was concluded.

Q. So these three or four witnesses at the beginning of trial, that was during the actual second trial itself, is that correct?

A. That was at the start of the trial, yes. I couldn't find where I made any records during the period except at a recess, perhaps, and I found that on that first day,

and I think, I believe you will see there I noted there were about ten spectators.

Q. Did you continue to make these notes throughout the course of trial as to the number of spectators present?

A. I tried to speed-read through those. I think I found only four. I found one where there might have been twenty spectators, one ten, two notations of three, and at the close of the case, I think I noted that there were some ten spectators.

Q. That was during closing arguments?

A. At the close of the case, yes.

Q. Now, Judge Cherry, as a result of the second trial I believe once again a conviction arose, is that [13] correct?

A. Yes. Well, it was a conviction on the homicide. There was a conviction of rape and homicide the first time. In the second trial, because of the reversal, Judge Reilly chose not to, well, then he was District Attorney, he chose not to proceed with the rape because he lost the major portion of his evidence through the lack of the use of confession with regard to that, so we proceeded solely on the other.

Q. So it is your understanding that the rape charge was not prosecuted at the second trial due to the prosecution's determination rather than something the Supreme Court had done, is that correct?

A. Well, yes, because the Supreme Court throwing out the whole of the confession which related to the rape, but they did not reverse without the right to try the rape case. That was a choice of DA Reilly, I will have to say that.

Q. Now, Judge Cherry, in your recollection can you think of anything that would indicate to you that Mr.

Yount received a trial by someone who was not impartial towards his cause?

MR. SCHUMACHER: Objection, your Honor. It calls for an opinion that is the basic subject matter of this litigation.

[14] THE COURT: If I understand your question correctly, I think the objection is well taken.

BY MR. BELL:

Q. Judge Cherry, do you have any recollection as to the number of people within each number of panels that were called for voir dire examination?

A. Well, probably 125.

Q. At that time were the panels normally called for criminal court 125 persons?

A. Somewhere around that number. There was another whole group summoned through the sheriff's office when we had exhausted the first panel, but I threw all of that out on the objections of Mr. King because he felt, and I agreed with him, that if he were correct and I accepted it, that if they did not just grab hold of a shoulder and say come, but merely asked if they were available, I think that was the objection. I don't recall that exactly. There was some objection on his part and I said, well, we will take no chance, we will throw all of it out, and I did, I accepted his attack upon it.

Q. Now, it is your recollection that at no time did you indicate that you were going to grant his motion for change of venue if you didn't seat a jury?

A. I am certain of that, but I think the record ought to show any of that if it existed because that is [15] something that certainly would not be an off-the-cuff thing walking down the hall, so to speak, or anything like that. I am sure that would not be done.

Q. At any point, did you keep anything off the record that defense counsel indicated to the Court that he wished to have placed on the record?

A. Never. I never as to any case. I am sure counsel would object if I tried. I don't understand the question, but all right.

MR. BELL: I have no further questions.

THE COURT: Mr. Schumacher.

Cross-Examination

BY MR. SCHUMACHER:

Q. You indicated, sir, that you were the presiding judge at both trials of Mr. Yount, correct?

A. Yes. We are only a one-judge county, and of course, you take the trials as they come.

Q. How many years have you resided in Clearfield County?

A. 72 years, lacking two months.

Q. And—

A. I am still living there.

Q. I hope for a long time in the the future.

A. I do too.

Q. Judge, during the period of time in 1966 to [16] 1970, where did you reside in Clearfield County?

A. My home town where I was born, DuBois.

Q. I believe you indicated on direct examination that you were elected to a judge for the first time in 1964?

A. For the only time. I was elected in November of 1963, but I assumed the bench January 7, 1964.

Q. When you say the only time, is that then a lifetime situation when you assume the bench?

A. No, it is not lifetime. It is a ten-year term. I chose not to run on a yes or no. I had personal reasons for never having wanted to run the second time, but I remained a judge because of the Constitution of the Commonwealth of Pennsylvania which declares that if you have never been defeated in an election and you choose to do so and have completed at that time have completed ten years as a judge, which was your term of office, you could elect to remain a judge at the assignment of the Supreme Court of Pennsylvania. If you were ever to practice law, even one item, you forfeited it all, but I never did. I went right in to the senior judgeship and have continued so until the present day.

Q. So you were the sitting judge in Clearfield County from 1964 for a period of ten years?

A. President judge, yes.

Q. And then you assumed the responsibilities of [17] Senior Judge?

A. That is correct.

Q. I understand. And since there is one judge in Clearfield County, might we assume there is also one courtroom?

A. Well, yes, one courtroom. There had been two, but only one, and there still is only one.

Q. And were both of these trials tried in the same courtroom?

A. Yes, they were.

Q. And that of course was your courtroom?

A. That is correct.

Q. And so you must be familiar with the seating capacity of the courtroom?

A. Well, I have never numbered them, but I would assume that shoulder to shoulder, it would hold approximately a hundred.

Q. And during the first trial when you indicated the students arrived after school and a number of other people came as spectators for the first trial that took place in 1966, would there have been occasions when the courtroom was full?

A. The first trial?

Q. Yes, sir.

A. I would think so, yes.

[18] Q. Do you recall an occasion when Mr. Yount testified when the doors of the courtroom were opened and people were standing out in the hallway observing his testimony?

A. I don't recall that, I am sorry. I would think, though, that there might have been people waiting out there because there were times when the courtroom was filled.

Q. Sir, you referred to your instructions of the news media. Did that pertain to their coverage of the actual trial of the case?

A. Oh, definitely. By that time we were pretty well informed as to what we were to do with the new rules that had emanated through the decisions of the United States Supreme Court.

Q. The instructions concerning the trial did not apply to pre-trial or post-trial coverage, isn't that correct?

A. Well, they weren't even allowed on pre-trial on various motions. Certain motions that were made pre-trial and we were required to keep everyone else out except the Court personnel and the parties who were involved.

Q. I would call your attention to the voir dire of the second trial that took place in 1970, and on direct examination you were asked whether or not you recalled the [19] courtroom being closed during any period of time. Sir, I would ask whether or not the difficulty that you and

counsel had in selecting a jury might have created a situation where you didn't want prospective jurors to hear any of the questions that were being asked?

A. Oh, they were not permitted. That was individual voir dire, and all prospective jurors were kept out, and I think you will note or the record speaks for itself, I don't know whether that is in there, but there were times, time and time again I would declare to a panel of jurors, you are not to declare anything that you are testifying to on voir dire to any prospective jurors of any kind.

Q. As best you can recall, can you explain to the Court how the selection of each juror took place within the courtroom?

A. They would be, the court officer would be sent out of the courtroom on the pulling of a name out of the wheel. It is not truly a wheel, it is a square box in our county. The wheel is one which is operated by the jury commissioners, but once the clerk of courts has it in his hand, those jurors which have been selected by the jury commissioners by lot are placed in that box and then the clerk of courts draws a name out. He calls it and then the court officer goes out and gets the juror and brings them [20] in, and that gives me some faint recollection that we didn't allow anybody in there during the examination, but I can't swear to that.

Q. I understand.

A. The record probably would show that. I don't know.

Q. You also testified concerning a member of the family that made a serious threat against Mr. Yount?

A. That was reported. I never carried it further. I just assumed when the sheriff so reported to me I declared I wanted extra care used at all times.

Q. Do you recall whether or not he reported to you the fact that a member of the family had a weapon?

A. I think that is true too.

Q. And do recall whether or not that incident took place in the first or second trial?

A. The first.

Q. I believe that you also testified on direct examination that you sat as the judge in charge of ten murder cases in Clearfield County during the period of time?

A. Not all in Clearfield County. I was assigned to other murder cases in Allegheny County, Blair County, Clearfield County and Butler County. I believe those are all the counties.

[21] Q. During the ten-year period of time that you were the sole judge in Clearfield County, do you recall how many first degree murder trials you would have been involved in, general homicide, which may have resulted in first degree?

A. Yes, sir.

I think the first case that Judge Reilly as DA and I as judge tried of any kind was a murder case, general homicide which resulted in first degree murder charge with the death penalty, the death penalty was thrown out by the Supreme Court, and the man is still serving, that was Commonwealth v. Aljoe.

Q. You mean the first case you were sitting as a judge?

A. Outside of some ordinary thing. I can't think of the lady's name, but a lady was charged with first degree murder of her brother. She was convicted, but not of first degree. Commonwealth v. Lyons was the killing of a policeman. That resulted in second degree. These were all within the first about two to three years of my ten-years in office. It might have been five or six there.

Q. Any of those involve rape other than Mr. Yount?

A. I don't recall it. It may have, but I don't recall it.

[22] Q. A number of times on direct examination, Judge, you responded that you didn't recall precisely what had occurred at the various trials, but whatever did occur would be on the record?

A. You mean in the course of trial?

Q. Yes, sir.

A. Well, I remember what occurred. What do you mean by what occurred?

Q. My point is whatever did occur, is it your position—

A. That called for a ruling?

Q. Would be on the record?

A. I would think so if it called for a ruling.

Q. And that was your normal procedure in any trial, to put whatever you felt was appropriate either by testimony or legal rulings on the record?

A. I would think so.

Q. So that way it would be transcribed and reported for future use?

A. Yes.

Q. And therefore that would be for the benefit in a criminal case of both the Commonwealth and the defendant?

A. I tried to be fair to everybody.

Q. Yes, sir.

A. I think in this case I would like to interpose [23] right here that I believe if you will look at the voir dire—

MR. SCHUMACHER: Excuse me, your Honor. I would ask the witness be instructed to only answer the questions asked.

THE WITNESS: I think you called for it, but I am not going to argue with you.

Have you ruled?

THE COURT: No, I was going to try to avoid it.

MR. SCHUMACHER: I was going to try to move on.

THE WITNESS: I think you called for it, but we will refrain.

BY MR. SCHUMACHER:

Q. When referring to your notes, sir, that you made during the second trial—

A. They are here. I brought them.

Q. As to the number of people that were in the courtroom?

A. They are here. I have folded over the sheets. I can't say that is all of them. I tried to leaf through them. I am a sitting judge and I am not going to go through everything.

Q. My question is that in arriving at the numbers, the total numbers that you testified to on direct [24] examination, I believe you indicated that you excluded members of the family?

A. Yes. Yes.

Q. In other words, there were spectators in the courtroom that were either related to the Rimers or were friends of the Rimers?

A. That is correct.

Q. And you did not include them in your calculations?

A. No.

Q. And there were individuals in the courtroom that were either—

A. Wait, friends, I didn't know his friends. I had better correct you on that. Where I knew they were members of the family, they were not included. There may have been friends. In fact, in the second trial there were friends, there were teaching friends of the defendant who were allowed in, and my recollection is we did not segregate defense witnesses. We segregated only Commonwealth witnesses.

Q. Well, you knew the members of the Rimer family in order to—

A. Oh, yes.

Q. —to make your calculations?

A. When you say did I know the members, I want to [25] be accurate here. I knew his sister, his father, his mother, yes.

Q. And you knew who the members of the Yount family were, is that correct?

A. I thought that is who you were talking about.

Q. If I didn't say Rimer the first time—

A. Well, if you said Rimer, I knew the grandfather and grandmother of the Rimers also. I am not sure that I knew Mr. Yount's grandfather and grandmother. I knew his father and mother.

Q. You did know members of each family, the Rimer family and the Yount family?

A. Oh, yes. I knew Mr. Yount himself. He taught my son.

Q. And I believe you indicated that there were court personnel that would be occasionally present at the second trial?

A. They would always be present. The sheriff and deputy sheriff. I am talking about tipstaffs and court crier. That is court personnel to me. I am not talking about courthouse. I included courthouse in the number that I would put down there.

Q. That was what I was referring to. Frequently in any criminal county courthouse employees are attracted to various types of cases, and I am trying to ascertain whether [26] or not you included such people in your calculation?

A. I certainly did. There wouldn't be too many at any one time, because if you know our commissioners, they kept track of what everybody was doing.

Q. Keep them working, not spectators?

A. You can be sure.

Q. Sir, the members of the news media were regularly in attendance, were they not?

A. Yes. There would be about three, sometimes four. There would be a representative of each of the two newspapers, the DuBois Courier Express, and the Clearfield Progress, and then I believe a Mr. Kennedy, I don't remember his first name, might have been up there again. He started to be interested in Clearfield County at the time of the Aljoe murder trial, and he wrote it up as city editors will in a way that he felt it gave everybody the correct picture of a kind of county it was and things of that nature. I think he came up. I am not sure of that. There may have been only the two at the second trial, two DuBois papers.

Q. Did you require them to station themselves in any particular place in the courtroom?

A. Yes. Their own table off to the right of defense table.

Q. I see. So then there were three tables in the courtroom, one for prosecuting attorneys?

[27] A. Yes, and then defense, and then to the right of defense counsel, the newspaper.

Q. Was that the same procedure that was utilized in the first trial?

A. Oh, yes. There were times they would not seat themselves there because they wanted to get a better view of a witness on the stand so they would sit back in the spectators section of the courtroom. I believe the Clearfield Progress reporter was the most attentive to that.

MR. SCHUMACHER: No further questions.

THE COURT: Judge, I have one question. I am not even sure of its relevance, but had a change of venue been granted, what would that have entailed as far as the obligations placed upon the county? The jury was sequestered anyway during the trial.

A. Oh, the change of venue rule at that time was that you chose your jury in another county long distant from DuBois and Clearfield, the whole County of Clearfield, and you tried your case there, and so all of the personnel of the county court, including the sheriff, the sheriff's deputies, tipstaffs and so on, would be taken to that county. The rule was not what it is today, that you may go to some other county by assignment of the Supreme Court and choose a jury and bring it back to Clearfield County.

Q. You would have had to move the entire court?

[28] A. You would have to move the entire court, the judge would have to stay there and be ready for any rulings that had to be made. Of course I wouldn't have objected, your Honor, if I could have been away.

THE COURT: To Palm Beach County. Mr. Bell.

MR. BELL: Just two brief questions on redirect.

Redirect Examination

BY MR. BELL:

Q. We have had testimony about a weapon supposedly in the hands of the member of the victim's family?

A. Yes.

Q. Did that occur at the courthouse?

A. No, it was supposed to have occurred in the jail and was prior to any trial.

Q. So the weapon was not in the actual courtroom?

A. Oh, no.

Q. And you indicated on cross-examination that some of the pre-trial matters with regard to I believe you were discussing the first trial at that time were held in camera without the press or anyone else?

A. Yes, motion to suppress testimony. Motion to suppress certain items, physical items of evidence, and that was carried through on the appeals also. The one I remember [29] distinctly is a pocket knife which was referred to.

MR. BELL: I have no further questions.

THE COURT: Mr. Schumacher.

Recross-Examination

BY MR. SCHUMACHER:

Q. Those motions that would have been heard in camera, they would have been transcribed by a court reporter?

A. Oh, absolutely. Well, not in camera, they would be held in the courtroom and we would not allow any witnesses in there. Under the rules of the Supreme Court at that time, and we would sequester the testimony; that is, we would order it be locked up and not viewed by anyone except upon an order of court, not even the Court got that testimony afterwards.

Q. But it was transcribed?

A. Oh, yes. Sure.

Q. Do you recall after Mr. Yount's second conviction he was ultimately sent to Rockview?

A. Oh, yes.

Q. Do you remember the community opposition against that?

A. Against his being sent to Rockview?

Q. Yes, because it was a minimum security prison rather than the maximum security prison where he had been?

A. If it ever came to my attention I have [30] completely forgotten it. I don't recall. I recall there was a lot of community feeling towards him, but the community feeling would be after he was sent to prison and the mother still is very active in trying to seek his detention in prison, if that is what you are referring to.

Q. Well, there was community interest in preventing him from receiving any release from prison through parole or pardon?

A. Oh, very definitely, yes, but there was nothing of that sort that occurred during trial.

MR. SCHUMACHER: Nothing further, your Honor.

THE COURT: Anything further?

MR. BELL: Nothing further.

THE COURT: Thank you, Judge.

MR. BELL: Your Honor, if there is no further need for Judge Cherry, might he be excused?

THE COURT: Fine.

(The witness stepped down.)

MR. BELL: Your Honor, we would like to call Judge Reilly to the stand.

JOHN K. REILLY, JR., being first duly sworn, testified as follows:

BY MR. BELL:

Q. Would you please state your full name for the record?

[31] A. John K. Reilly, Jr.

Q. And Mr. Reilly, what is the nature of your employment currently?

A. I am president judge of Clearfield County.

Q. When were you elected to that position?

A. 1973.

Q. When did you first assume that position?

A. January 1974.

Q. Now, during the course of the trials of Commonwealth of Pennsylvania vs. John E. Yount that occurred in 1966 and 1970, I believe, what was the nature of your employment at that time?

A. I was the District Attorney of Clearfield County.

Q. And do you recall when you first assumed that position within Clearfield County?

A. 1964.

Q. And so did you serve from 1964 until your election to the bench as District Attorney?

A. Yes, sir.

Q. And you are in fact the person who prosecuted both of these cases, is that correct?

A. I did.

Q. Did you have any assistants with you at the time of these various cases that aided you in the [32] prosecution?

A. Assistant District Attorneys?

Q. Yes.

A. I had one.

Q. Who was that?

A. Mr. Irving Finnell.

Q. But basically through the course of these two trials, you were chief prosecutor?

A. I was.

Q. Now, Judge Reilly, prior to your assuming the position of District Attorney, could you relate what your legal education was, et cetera?

A. I graduated from Dickinson School of Law in 1964, was admitted to the Pennsylvania Bar Association and the Clearfield County Bar Association in 1961 and practiced privately and as District Attorney until 1974 when I took the bench.

Q. Now, the District Attorney position prior to the time that you took the bench, that was a part-time position?

A. Yes.

Q. And you could practice privately also?

A. Yes.

Q. Now, Judge Reilly, turning your attention to the first trial that occurred in 1966, there have been [33] vari-

ous indications that the courtroom was filled, the hallway may have been filled, et cetera. Do you have any recollection as to the number of people present within the courthouse or outside the courthouse during the first trial?

A. I recall no spectators outside the courtroom. That is not to say there were none there. I have no recollection of them. The courtroom itself I believe was fairly full.

Q. Do you have any knowledge of your own as to the number of persons who can be seated within the courtroom?

A. Yes, I do.

Q. And could you please relate for us the number?

A. Two hundred.

Q. And is there any means by which you know that particular number?

A. Yes, there is.

Q. Could you please relate why you know that number?

A. Clearfield County for the last at least seven years has been in the process of attempting to build a new courthouse, and in aiding and planning the courtroom facilities for the new courthouse, we did measurements and studies as to what the present courtroom can hold and what we would hope to be able to accommodate in the new [34] courthouse, so I know that the spectators' section in our courtroom will hold two hundred spectators.

Q. And that is the same courtroom as used during both of the Yount trials?

A. Yes, sir.

Q. Do you have any recollection as to persons outside of the courthouse on the courthouse grounds, et cetera, during the first trial?

A. You mean with regards to the trial itself?

Q. I believe Mr. King indicated that at one point the crowds were packing the courthouse square, even on to the street in front of the courthouse. Do you have any recollection of that?

A. Yes. That did not occur.

Q. Now, with regard to the conduct of the spectators during the course of the from first trial, do you have any recollection as to whether they applauded or booed, et cetera?

A. No, they did not.

Q. Now, the first trial resulted in a conviction, is that correct?

A. Yes, sir.

Q. And that was subsequently appealed, I believe?

A. By the defendant.

Q. Now, at one point I believe the Philadelphia [35] District Attorney's office became involved to some extent in briefing the case, it that correct?

A. At my request.

Q. Would you please indicate what part, if any, they played in any of the appeals on the case?

A. We found ourselves in an unique situation in this particular case in that the offense occurred in April of 1966, the Miranda decision from the Supreme Court of the United States came down in June of 1966. At that time we felt that since these occurrences had taken place prior to Miranda, perhaps we should not be subject as stringently to the ruling in that case. The Supreme Court of Pennsylvania disagreed and we petitioned for certiorari to the United States Supreme Court at that time. Once we had made the decision to petition for cert, we engaged the services of the Philadelphia District Attorney's office to help us in preparing the petitions to the Supreme Court.

Q. Now, as a result of those petitions, they were denied by the Supreme Court, is that correct?

A. Cert was denied.

Q. So the case was once again retried within Clearfield County?

A. That is right.

Q. Now, the initial trial involved rape and murder and the second trial involved only murder. Would you [36] please relate to the Court what if any decisions you made as to what charges were prosecuted?

A. When it became apparent we were going to have to retry the defendant, we went through or examined the Supreme Court decision quite carefully, determined what we felt in our opinion would still be admissible at the second trial, and based on that, determined that we would have insufficient evidence to sustain a charge of rape, so as prosecutor, I decided to proceed only on the charge of murder.

Q. Now, then it is my understanding that was your decision as a prosecutor rather than the Supreme Court indicated go you could not proceed on the rape charges, is that correct?

A. That is right.

Q. Now, just prior to the beginning of the second trial and even in to the voir dire examination, were there various change of venue motions presented to the Court?

A. There were.

Q. Do you have any recollection as to the number of them or how often they occurred?

A. My recollection is that prior to commencement of jury selection there was one and that thereafter during the course of jury selection it was a daily motion.

Q. Each time one of these motions were made, do [37] you have any recollection as to what Judge Cherry did with them? What if anything occurred?

A. I believe that the pre-trial motion included taking of testimony and introduction of exhibits. Once voir dire commenced, I don't believe that any testimony was taken, but I believe Judge Cherry just ruled on the motion at that time.

Q. And you indicated during voir dire these were almost daily motions?

A. I believe they were.

Q. Now during the course of the second trial do you have any recollection as to the number of persons present in the courtroom during the course of the trial?

A. I don't have any exact recollection. The manner in which our courtroom is situated, counsel sits with his back to spectators' section, so I didn't have a continuous view of the spectators section. I know that the number in the courtroom was less than at the first trial, but to be more specific, I would hestitate to testify.

Q. During the course of the jury selection for the second trial I believe Judge Cherry indicated that a panel at that time consisted of 125 persons. Did you go through numerous persons with regard to the voir dire?

A. Well, we went through more than one.

Q. Were those full panels of 125 people?

[38] A. I don't believe they were, and I don't believe the first panel consisted of 125. I think that may have been the number called, but after excuses were granted and what not, it is my recollection that a considerably lesser number was actually available for voir dire.

Q. Were you present during all of the change of venue motions or discussions had before the Court?

A. I was certainly present at all the motions because I argued in opposition to them.

Q. Do you have any recollection of Judge Cherry indicating to defense counsel that if a jury was not seated within a certain period of time or before the exhaustion of a certain panel that he would grant the change of venue motion?

A. Do I recall that?

Q. Yes.

A. I do not.

Q. At any time during the course of the second trial was the courtroom ever closed, to your recollection?

A. Closed to spectators?

Q. Yes, to the public?

A. It may have been during voir dire. Certainly the prospective jurymen were excluded. Whether spectators were excluded at that time, I do not recall, but during the course of the trial itself, the courtroom was not closed, to my [39] recollection.

Q. At any point do you have any recollection of the Court during voir dire stopping voir dire on its own motion for purposes of change of venue discussions?

A. On its own motion, I do not recall that.

Q. Now, the second trial I believe also resulted in conviction, is that correct?

A. Of murder in the first degree, yes.

Q. And were various post-trial motions filed by defense counsel with regard to the second trial?

A. Yes.

Q. And do you have any recollection whether any of those motions dealt with the change of venue issue?

A. Yes, they did.

Q. And do you happen to know the result or who ruled on the second appeal of the second trial. Was that the Pennsylvania Supreme Court?

A. That is correct.

Q. What was the result of their ruling?

A. The conviction was affirmed.

MR. BELL: I have no further questions, your Honor.

THE COURT: Mr. Schumacher.

Cross-Examination

BY MR. SCHUMACHER:

[40] Q. As the District Attorney in the first trial of Mr. Yount in 1966, it was your responsibility to present evidence on behalf of the Commonwealth of Pennsylvania that you felt, sir, in your opinion would result in his conviction of first degree murder, is that correct?

A. Basically. I believe the District Attorney's duties and obligations extended beyond that, but certainly that is part of them.

Q. When you argued to the jury after the close of testimony in that case, did you not argue that he was guilty of first degree murder?

A. Yes, sir, I did.

Q. And was that not part of your responsibility as the District Attorney at that time?

A. I felt at that time it was my duty to present to the jury all the evidence bearing on the case and to present to them the position of the Commonwealth, yes.

Q. And did you not seek a death penalty at that time?

A. No. I did not withdraw that option from the jury. The jury had that option.

Q. And following Mr. Yount's first conviction after the 1966 trial, you continued to represent the Commonwealth in connection with the appeals taken on Mr. Yount's behalf, is that correct, sir?

[41] A. Yes, sir.

Q. And that was through the ultimate reversal by the Pennsylvania Supreme Court?

A. That is correct.

Q. And then as I understand your testimony, judge, you then secured the services of the Philadelphia District Attorney's office to attempt to have the Supreme Court of the United States grant certiorari in the case?

A. That is correct. I had no idea how to go about that myself.

Q. And that application was denied by the Supreme Court?

A. It was.

Q. So then the case I presume was returned to Clearfield County for retrial?

A. Yes.

Q. Then you continued to represent the Commonwealth in the second trial?

A. I did.

Q. And you in fact were trial and lead counsel?

A. That is correct.

Q. And at that time you again sought a first degree murder conviction?

A. We did.

Q. However, I would assume that any possibility [42] of the death penalty had been negated by the inter-

vening legal decisions so that the maximum penalty then was life imprisonment?

A. That is correct.

Q. And I would presume, sir, as part of your duties as the District Attorney of Clearfield County you sought that sentence?

A. Well, as I recall, after the jury returned its verdict of murder in the first degree, Judge Cherry merely instructed them that they must return as the penalty portion of their duties a sentence of life imprisonment.

Q. And you remained on the case as the District Attorney following the second conviction?

A. Yes, sir.

Q. And its successful litigation through affirmance by the Supreme Court of Pennsylvania?

A. That is correct.

Q. And no applications for certiorari was then taken on anyone's behalf to the Supreme Court of the United States?

A. Certainly not on behalf of the Commonwealth. I don't recall any being filed on behalf of the defense.

Q. Following the conviction and sentencing of Mr. Yount after the second 1970 conviction, sir, did you have occasion to oppose his release from state custody through [43] parole?

A. Yes, sir.

Q. And did you not do so on a number of occasions?

A. I have done so on every occasion, to the best of my knowledge, that he has applied.

MR. SCHUMACHER: No more questons.

THE COURT: Mr. Bell?

MR. BELL: Nothing further.

THE COURT: Thank you, Judge.

(The witness stepped down.)

MR. BELL: Your Honor, the Commonwealth would have no further witnesses.

THE COURT: Mr. Schumacher, do you plan to call any further witnesses?

MR. SCHUMACHER: Yes, your Honor.

THE COURT: How about a five-minute recess?

(Court was thereupon recessed at 11:35 a.m. and resumed at 11:43 a.m.)

THE COURT: Mr. Schumacher, do you want to proceed, please.

MR. SCHUMACHER: Thank you, your Honor.

Mr. Sebino.

FRANCIS V. SEBINO, being first duly sworn, testified as follows:

BY MR. SCHUMACHER:

[44] Q. Your name, sir?

A. Francis V. Sebino.

Q. Occupation?

A. Well, I am an attorney, currently not practicing general law. I am employed by the Union National Bank of Pittsburgh in the trust department.

Q. Prior to that time what was the nature of your employment?

A. I was an attorney, practicing attorney since 1960 until 1978, June of 1978 when I went to the Union National Bank of Pittsburgh.

Q. With whom?

A. I practiced during the vast majority of my career with Homer W. King and some other lawyers in the same office.

Q. Would you place your educational background and the courts to which you have been admitted on the record, please?

A. Well, I attended the University of Pittsburgh undergraduate school from 1953 to 1957, attended Dickinson School of Law from 1957 to 1960, graduated from Dickinson, passed the bar examination in July of 1960. I was admitted to practice in about in the fall or early winter of 1960 and except for six months tour of duty in the army from January of 1961 to July of 1961, I practiced law actively to 1978.

[45] Q. For the interest of the situation, was one of your classmates at Dickinson Judge Reilly?

A. He certainly was. A very good friend of mine.

Q. Have you been admitted to practice to the Pennsylvania courts?

A. I was admitted to practice in all the Allegheny County courts, the Federal District Court for the Western District of Pennsylvania, the Pennsylvania Superior and Supreme Courts and the United States Supreme Court.

Q. What if any was your relation with John Yount during the period of time in 1960's and 70's?

A. I was one of the attorneys who worked with Mr. King in the defense of Mr. Yount from April of 1966 through 1970 when the case was tried a second time and

went to the Supreme Court a second time following the second conviction.

Q. Were you in court with Mr. King on each day of the trial of the two cases?

A. Yes.

Q. And did that include post-trial and pre-trial matters?

A. I would say yes. There may have been one occasion on a pre-trial motion of some type during the first or second trial when I did not go to Clearfield, but basically I was with Mr. Yount on almost every occasion when [46] we had both pre-trial and post-trial motions and certainly on every occasion during the actual trials of the case.

Q. And did your representation of Mr. Yount include pressing for a change of venue at any time?

A. Yes, sir.

Q. And was that in connection with only the second trial or also the first trial, if you recall?

A. I believe we asked for a change of venue in both trials.

Q. What was the reason?

A. Well, we did not feel Mr. Yount could get a fair trial in Clearfield County.

Q. Why?

A. Well, we felt that the feeling was such in Clearfield County that we felt that the publicity and the high degree of feeling that we sensed, both from, you know, from speaking with Mr. Yount's relatives, Mr. Yount, from the publicity that we read and so forth, just the nature of the case, we did not feel Mr. Yount could ever get a fair trial.

Q. Did that opinion decrease after the first conviction?

A. No, sir.

Q. It remained the same or increased?

A. I frankly, well, I would say, I can't say it [47] increased or decreased, but we always felt and I always felt very strongly through both trials that Mr. Yount, that we could never impanel a jury of people who could give him a fair trial.

Q. And was—

A. I still feel that way. I still don't feel—it is my own personal opinion if Mr. Yount were tried today that the feeling would be such that he could never get a fair trial in Clearfield, but of course then I may be a little biased.

Q. What do you base that on, sir?

A. Just the nature of the case. Clearfield County, although it is large in area, I believe it was relatively small in population. It was, it is not like Allegheny County where crimes are rampant. This crime, this case was significant, in our opinion. Clearfield County was a high degree of feeling. The fact there was a rape charge in connection with the murder charge and the fact it involved a schoolteacher and a homicide with respect to one of his students, I just didn't think that the county was such that it could handle a case of that magnitude without their being significant feeling in that county.

Q. How was that feeling reflected in court attendance at the court trial?

A. Well, my recollection of the first trial was [48] that the courtroom was filled to capacity at almost all times during the trial.

Q. Do you recall any incident when the courtroom doors were open and people or spectators were standing in the hallway outside the courtroom?

A. Well, I would have to say that I did perhaps see that, but I couldn't swear to that. I think that there were times when the doors were open and there were people standing in the back, but that is something that I can't really, in my mind right now I can't visualize and say yes that happened. It is just my general feeling that there were occasions when that was so.

Q. Do you recall any incidents where there were groups of people outside the courthouse?

A. You mean waiting to get in or awaiting—I am not sure.

Q. Do you recall ever having to go through a crowd of people in order to get in the courthouse?

A. From the outside in to the courthouse?

Q. Yes, sir.

A. Not specifically, no. I don't recall. I don't say that didn't happen, but I don't have any specific recollection.

Q. Do you recall any gathering of spectators outside the courtroom following the first conviction?

[49] A. It seems to me that there were some people standing outside the courthouse following the verdict in the first case, but, you know, as to whether or not they were specifically waiting there in regard to this case or not or whether they just happened to be people congregated out in the street, I couldn't say that.

Q. Do you recall any conduct of the people in attendance at the first trial concerning whether or not they reacted to any rulings of the court?

A. Well, I heard your questioning of both Judge Cherry and Judge Reilly in this regard and I can't say that there were situations where people got up and applauded or gave a Bronx cheer specifically, but I do recall certainly an under-current, in other words, a favorable ruling, an unfavorable ruling perhaps being met with a gasp or a kind of of—I don't know exactly how to describe what I am saying. A kind of a certain feeling of agreement in regard to a favorable ruling and a certain gasp, perhaps, in respect to an unfavorable ruling so far as the Commonwealth was concerned, but I don't recall a specific situation where people, you know, got up and cheered or anything of that nature. The courtroom had more decorum than that, but I have a certain feeling that the under-current that the audience would basically react favorably to a ruling that was in favor of the Commonwealth and unfavorably insofar as [50] a ruling that was unfavorable to the Commonwealth.

Q. Do you recall the number of days that the first trial took?

A. I think the first trial took the better part of two weeks. I think we started on a Tuesday or Wednesday and I think it ended up on a Friday of the second week or something of that nature. It only took us a day or so in the first trial to impanel a jury. It took us two weeks in the second trial.

Q. In the first trial, would you again repeat whether or not the courtroom was filled, empty, half full?

A. I would say my recollection is almost every day during the first trial the courtroom was filled to capacity.

Q. Would that have only been the later part of the day or would it have been throughout the day?

A. My recollection is it was all day. My recollection is that the courtroom was crowded even by the time counsel reached the counsel table in the first trial.

Q. Do you recall whether or not the Court did anything to instruct or control the people in attendance?

A. Well, the judge set certain guidelines and so forth as far as the courthouse itself was concerned, you could only go up certain steps. Counsel were allowed up what we called the back steps and members of the [51] Pennsylvania state police, the Commonwealth and defense witnesses could go up what was referred to as the back steps and courthouse personnel, but all people who were in attendance had to go up through another way in to the courtroom. There were two ways in to the courtroom. There was a back way and there was a way that most people would come in, and the audience in effect had to come through the main door and only people who were connected with the case could come up the back steps and come up the back way in to the courtroom, and this was pretty generally enforced by the Court. The Court had deputies there and so forth to assure that people other than court personnel did not come up that way.

Q. Do you recall any incidents concerning the matter of safety to your client?

A. The only thing I recall specifically, well, the Court stationed members of the state police who were also witnesses in the case, had them sit right behind the counsel table in the first row of the audience. Some of them sat over where the Court indicated the members of the press would sit, other witnesses would sit. That was to the right of where the counsel sat, to the left of the bench, and then the Court asked certain members of the state police

to station themselves in the first row of the audience, and [52] I remember prior to the first trial the Court indicated to us that there had been some high feeling in the case and that the Court had taken precautions to protect everyone, but he advised counsel to be alert, and that was a little disconcerting to me. As a matter of fact, I remember Mr. King making the point that he would prefer that the members of the state police instead of facing the bench, would they please face the audience because he didn't think that the state police looking toward the bench was going to help us too much if somebody got very energetic and tried anything.

Q. Do you recall, without trying to be too leading, any specific threat to Mr. Yount during either trial?

A. I personally was not made aware of any specific threat to Mr. Yount during either trial.

Q. Do you remember the courtroom being closed during either trial?

A. No, except, during the actual trial of the case?

Q. Yes.

A. No, I don't recall the courtroom being closed to the public particularly, no.

Q. Do you remember the courtroom being closed during the voir dire of either trial?

[53] A. I believe it was closed during the voir dire of the trial, but I was not aware as to how that was imposed or who was actually in there, because it seems to me that there were people who were in the audience during voir dire, but I don't recall whether they were just members of the general public, whether they were other jurors who were not involved in the selection for that particular case or whether they were just court personnel, but

it seems to me there were other people in court during voir dire, and I don't know whether or not specifically the courtroom was closed to others.

Q. Which voir dire?

A. The second trial.

Q. Getting on to the second trial, you continued to press the motion for change of venue?

A. Yes, sir.

Q. And unsuccessfully?

A. Right.

Q. And do you recall whether or not that motion was repeated during the course of voir dire?

A. Almost daily, I would think.

Q. Do you recall any incident occurring where the judge recessed the case because of problems that had developed in selection of the jury to consider the issue of a change of venue motion?

[54] A. I am not sure I follow. The time that I recall, Judge Cherry referred to the time when we made a motion to challenge the array, that was after we exhausted the first panel. I am not sure whether there had been a second panel, but either after the first panel of jurors were exhausted or after the first and some others were exhausted, we challenged the array when we somehow discovered that the jury, the prospective jurors had not been gathered at random but had apparently been gathered almost on a selective basis, and I say selective in that when we put a witness on voir dire and Mr. King asked him how did you come to be here today, the witness, the prospective juror said he had been approached to find out if he was available to serve and if he would serve on the jury and he had agreed and so forth, and on that theory we chal-

lenged the array and Judge Cherry granted that motion and threw out that whole bunch of jurors.

Q. Then further panels were selected?

A. That is right.

Q. There was a period of time where a number of successful challenges were made to individual jurors, is that correct?

A. Oh, sure.

Q. Do you recall then whether or not a recess occurred to consider a change of venue issue?

[55] A. Well. unlike Judge Cherry's opinion or recollection, I have another specific recollection of about his action in that regard. It is my recollection that at one point when we had gone through a great number of jurors and had not yet impaneled a jury that Judge Cherry said at one point that if we did not impanel a jury by the time we had exhausted the particular panel that we were on that he was going to grant a change of venue. Now, Judge Cherry says, one, he doesn't either recall that or that did not happen. My recollection is that that did happen. As a matter of fact, it was my recollection that this was almost initiated by Judge Cherry himself. In other words, even though we were making daily motions for a change of venue, that the judge himself said at one point that "if we don't get a panel at the end, if we don't get a jury at the end of this panel, I think I am going to grant a change of venue," but when we got to the end of that panel and had acquired now a few more jurors and had gotten to the point where now we had almost a complete panel, nine or ten or something of that nature, he changed his mind, and he decided then he wasn't going to do that, and then sent

out for some more jurors, and by that point we had exhausted just about all of the preemptory challenges that we had and the last couple of jurors were seated I think without benefit of our having any preemptory challenges left.

[56] Q. Did the use of those preemptory challenges have anything to do with the statement that had been made by Judge Cherry?

A. My recollection is that it did. It may have been poor strategy on our part in retrospect, but my recollection is that based on the theory that the judge was going to grant a change of venue if we didn't get a jury impaneled by the time we had exhausted that particular panel that we then used the balance of the preemptory challenges that we had in effect to get through that panel without impaneling a jury because we felt strongly enough about the case that a change of venue was necessary that at that point we were willing to do just about anything to get the venue changed.

Q. And why at that point was the change of venue so necessary?

A. Again because we just simply felt in our minds that Mr. Yount could not get a fair trial, and of course Mr. Yount himself participated in those decisions and from the standpoint we would talk with him daily and I felt that John himself felt that he could not get a fair trial.

Q. Where?

A. In Clearfield County, and therefore we felt that it was in his best interest and in effect also acceding to his wishes that we try at all costs to get the venue [57] changed.

Q. And had you conveyed to Mr. Yount any information concerning the statement of Judge Cherry?

A. Well, we would have—I can't specfically remember that point, but I am sure that we would have told him anything that had occurred in chambers that he was not a party to or did not hear. We would convey that to him so he would be aware of what was going on. We wanted him to be aware of what we knew.

Q. Was that the normal procedure you followed in representing him?

A. Yes.

Q. I direct your attention to the second trial and would ask you to instruct the Court your best recollection of the people in attendance?

A. Well, my best recollection is that certainly there were not as many people in attendance at the second trial as there had been at the first trial, but if I were to put an estimate on it, I would say that the courtroom was perhaps at least half full most of the time, but that is again just my best recollection now. I have no notes or any specific recollection as to how many people were there every day, but it is just my feeling that there was, the trial was better attended than Judge Cherry recalls, certainly not to the extent it was at the first trial.

[58] Q. Did your representation of Mr. Yount continue after the completion of the second trial?

A. Through the Supreme Court of Pennsylvania appeal, yes, sir.

Q. And the issue raised on appeal included the denial of the motion for change of venue?

A. Yes, sir.

Q. And ultimately the Supreme Court of Pennsylvania rejected that contention?

A. That is right.

Q. And did your representation then continue through his efforts to secure release from prison through parole?

A. I personally did not participate in any of those requests for parole by Mr. Yount. I am not sure whether Mr. King did, but I did not personally participate or represent Mr. Yount at all in any of his requests for parole.

MR. SCHUMACHER: I have no further questions.

THE COURT: Mr. Bell.

MR. BELL: Just a few questions, your Honor.

Cross-Examination

BY MR. BELL.

Q. First of all with regard to the change of venue motions, would it be fair to say that the change of [59] venue motions were more prevalent during the second trial than they were at the first trial?

A. Generally speaking, I think so. I think that we did make more motions during the second trial than we did during the first trial. As I indicated earlier, the jury selection the second time took place over a two week period, whereas in the first trial it was only a day and a half or two that I recall, so there were, every day that the jury selection went on seemed to bring a new motion for change of venue, so, yes, during the second trial I think there were more motions for change of venue.

Q. Now, you indicated that you recollect that the various stairways to the courthouse were like the front

stairway that most of the spectators went in because that comes in front of the courtroom, is that correct, where most of the spectators sit?

A. Well, as I recall the courthouse, when you go in the front door we went down the long hall, past the clerk of courts office and so forth, and then at the very end of the hall there was a stairway that went up, and that was a back stairway. When you went up that way, when you got to the top of that landing there was an anteroom or a large room there off of which was the law library and there were a few benches there, and then when you went straight back along your left there was a little doorway that went right [60] to the left of the bench.

Q. It actually comes in from behind the bench?

A. That is right, and that is the entrance we would use. The spectators, and I don't know how they got there, frankly, I don't remember another stairway, but the spectators came in a doorway at the back of the courtroom, a large doorway.

Q. So if they were to come up the same stairs you came up they would actually have to come from the back of the bench and proceed from the middle of the courtroom to get their seats?

A. That is right.

Q. Do you happen to know where the jury panel courtroom is in the courthouse?

A. My recollection is that when you came up this back stairway in to the second landing there, there was a little library off to your left and there was a place, a little room just before you went in to the courtroom there where I think they kept John sometimes, and I think the room

opposite it the law library on the other side of the hall is where the jury people stayed. I am not sure.

Q. But at any rate, the jury panel's deliberation room, et cetera, is up on that second floor area back behind the courtroom, to your recollection?

A. Yes, I think so.

[61] Q. Now, you indicated at one point, and I believe this is with regard to the first trial, there were State policemen sitting out in the first row of the audience, et cetera?

A. Yes.

Q. Was that just the first trial, or did that occur at the second trial also, if you know?

A. I don't recall that. I do recall it in the first trial. I don't specifically recall it in the second trial.

Q. Now, you did indicate that you have a recollection of Judge Cherry making a statement with regard to the exhaustion of this one panel they were on and if it was exhausted without a jury being seated that he would grant the change of venue motion?

A. That is my recollection.

Q. Do you have any recollection as to whether that was done in the courtroom, on the record, or where?

A. I think it was done in chambers. I think at one point Judge Cherry in effect said from the bench during voir dire, "I want to see counsel in chambers following this voir dire," I don't know if it was following a particular witness, or during a lunch break, but I think he said from the bench, "I want to see counsel in chambers, and we went in chambers, and that is my recollection where he [62] made the statement.

Q. The change of venue motion was asserted on appeal?

A. Yes.

Q. Was that particular indication, Judge Cherry had made that and that you had used up those peremptory challenges, was that ever asserted during those appeals?

A. I don't recall that.

MR. BELL: I have no further questions.

THE COURT: Mr. Sebino, I am just curious as to your comment that the first jury selection proceeded so much more rapidly than the second and how do you account for that in view of the fact that there was apparently so much more publicity attendant to the first trial?

A. I have been sitting here wondering that same thing. I don't know the answer to that question as to why the jury selection proceeded so much quicker the first time. I think that probably it was because as a result of the first trial and the publicity that the trial itself had obtained that if anything, we may have even felt more strongly the second time that the change of venue was necessary than perhaps we did even the first time, and we started to ask questions of every juror, "Have you formed an opinion? Did you read about the first trial? Do you know anything about the case?" In addition to asking them if they [63] knew anything about the incident, my recollection is we would ask them had they read about the first trial and formed any opinion and so forth. The only answer I can give at this point to that question is that we felt more strongly about it even the second time than we did the first time and also because of the fact the first

trial had taken place, we felt that that maybe it was even more difficult at that point because of the publicity that had occurred with respect to the trial itself and the fact the man had been convicted once there, you know, there had been a verdict of guilty returned and I think we felt that it would be much more difficult for the people of the community to now sit on that jury and find him not guilty in light of the fact that he had been convicted already there.

THE COURT: Mr. Schumacher.

BY MR. SCHUMACHER:

Q. Did the fact that the first jury had heard the entire confession have anything to do with it?

MR. BELL: Objection, your Honor. That is leading.

THE COURT: Mr. Schumacher, would you rephrase your question?

BY MR. SCHUMACHER:

Q. As a part of your trial strategy in requesting a change of venue, what factors were taken in to [64] consideration, if any, concerning evidence that was admitted at the first trial?

A. Well, certainly as I said in response to the Court's question, the first trial and the fact that the evidence that had been adduced at the first trial had been made public, including, obviously, a confession in the first trial which was admitted in to the first trial but which was kept out of the second trial, whether that aspect of the confession specifically caused us to want a change of venue, I can't say. All I am saying is that the fact that the evidence had all

come out and the man had been convicted, I think that led us to believe that if anything, it was going to be harder than ever to get a fair trial the second time around.

Q. What was the defense at the first trial?

A. The defense at the first trial was temporary insanity.

Q. Did Mr. Yount testify?

A. Yes.

Q. Did the nature of the defense and the fact of his testimony have any bearing on your increased efforts to secure a change of venue at the second trial?

A. Well, the only thing I can say is I think I have answered that generally that all of the evidence that came out in the first trial, obviously, and had been made [65] public we felt that the people now were aware of this whole situation and that anybody that hadn't heard about the case the first time around certainly must have heard about it by now and formed an opinion.

MR. SCHUMACHER: I have nothing further.

THE COURT: Mr. Bell.

MR. BELL: Just one brief area.

BY MR. BELL:

Q. With regard to the jury selection at the second trial, several panels or several groups of people had to be brought in for jury selection, is that correct?

A. Yes, sir.

Q. At any point was the jury selection delayed while they had to go out and obtain those people? Could that be the reason it took longer to select the jury for the second trial?

A. They did go out and get some more people, but my recollection is that did not delay the voir dire more than a half a day at the most. It seems to me that occurred over a weekend. It seems to me as a matter of fact this panel that the array was challenged I think was acquired over a weekend and it was the following Monday that array was challenged, and then they had to go get some more people, but I don't think it delayed the trial, the voir dire more than half a day or a day at the most.

[66] MR. BELL: I have no further questions.

THE COURT: Mr. Schumacher, do you have anything further?

MR. SCHUMACHER: I have nothing further.

THE COURT: Thank you.

MR. SCHUMACHER: I would like to thank Mr. Sebino for interrupting his vacation to come here under subpoena to testify.

THE COURT: Do you have any further witnesses?

MR. SCHUMACHER: I have no further witnesses, your Honor, and I would ask that a specific ruling be made by the Court that the testimony is closed for two reasons. One is that my client might be held at Western State Penitentiary pending any further proceeding because I don't want to bring him back a third time, and he has asked me to ask you to enter an order to that effect if you would be willing to do so, I could draft one.

THE COURT: Mr. Bell.

MR. BELL: Your Honor, on behalf of the Commonwealth, we have no further testimony we can perceive being placed on the records so we would have no objection to closing the record.

THE COURT: Then the marshals, I am not sure how we are doing the transportation, but Mr. Yount will be taken back to Western and I assume Western is responsible [67] for transporting him?

THE DEFENDANT: Your Honor, all I was requesting was that somehow the state correctional institution personnel be notified there is no further need for me to stay there and otherwise they may hold me there.

THE COURT: Can the marshals let them know he is now free to return to Camp Hill?

THE DEFENDANT: Thank you.

THE COURT: Now we have a briefing schedule. Are we able to adhere to that schedule?

MR. SCHUMACHER: I hope we can. My brief is finished and I hope to file it today. When I say my brief, I am plagiarizing Mr. Yount who essentially wrote it. We met at Camp Hill about two weeks ago. I went over everything with him and I have made some changes. Our brief will be submitted hopefully today. I have a number of exhibits to attach to it, so whatever additional briefing is necessitated by the new evidence today will be included in any reply brief that I would file, and I would prefer to adhere to the original briefing schedule.

THE COURT: And the Commonwealth I believe had until the end of January or first of February.

MR. BELL: February first.

THE COURT: Will you be able to adhere to that?

[68] MR. BELL: Yes.

THE COURT: As I previously indicated, I have already read the voir dire myself because I don't want to delay further than has to be. If the Commonwealth will get its brief in by the first of February and if there are no reply briefs, would you let me know in writing there will be no reply briefs and I can't see any reason we can't dispose of this by say mid-February. I have already drafted a factual background and my notes from the reading of the voir dire.

O.K. Is there anything further?

MR. SCHUMACHER: Nothing further.

MR. BELL: No, sir.

THE COURT: Then we will thank everybody for coming in and we will wait to receive your briefs.

(The proceedings were thereupon concluded at 12:20 p.m.)

Reporter's Certification

I hereby certify that the foregoing is a true and complete transcript of the proceedings held in the aforementioned action held on December 28, 1981 before Robert Mitchell, United States Magistrate.

(s) Marvin D. Cutright
Marvin D. Cutright
1031 Post Office Building
Pittsburgh, Pa. 15219

MAGISTRATE'S REPORT AND RECOMMENDATION
[Caption Omitted]

I. *Recommendation*

It is recommended that the petition of Jon E. Yount for a writ of habeas corpus be granted and that he be discharged from custody unless, within sixty (60) days, the Commonwealth retries him under circumstances that will assure a fair and impartial jury.

II. *Report*

Jon E. Yount has presented a petition for a writ of habeas corpus which he has been granted leave to prosecute in forma pauperis.[1]

Yount is presently incarcerated at the State Correctional Institution at Camp Hill serving a life sentence, following his conviction, by a jury of first degree murder at No. 2, May Sessions, 1966, in the Court of Common Pleas of Clearfield County, Pennsylvania. This sentence was imposed on March 26, 1973.

The petitioner was originally tried and convicted of first degree murder and rape and sentenced to life imprisonment. The judgment of sentence was appealed

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[1] The petition was originally filed in the United States District Court for the Middle District of Pennsylvania and transferred to this Court pursuant to the provisions of section 2241(d) of Title 28, United States Code.

to the Supreme Court of Pennsylvania, which Court reversed the conviction and remanded for a new trial in view of the decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). *Commonwealth v. Yount*, 435 Pa. 276 (1969), certiorari denied, 397 U.S. 925 (1970).

After the denial of a request for a change of venue, jury selection commenced on November 4, 1970 and was completed on November 16, 1970. Testimony began on November 17, 1970 and on November 20, 1970, the petitioner was again convicted of first degree murder.[2] The jury again fixed the sentence at life imprisonment, and formal sentence was imposed on March 26, 1973. On appeal, the judgment of sentence was affirmed. *Commonwealth v. Yount*, 455 Pa. 303 (1974).

In his direct appeal to the Supreme Court,[3] the petitioner presented the following questions as his bases for relief:

> 1. Did the lower court err in refusing to order a change of venue in the within case?
>
> 2. Did the lower court err in certain of its rulings on challenges for cause made by the defendant during the voir dire?

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[2] On retrial, the petitioner was not charged with rape. At the evidentiary hearing held on December 28, 1981, the former Clearfield prosecutor testified that the determination to dismiss the rape charge on retrial was a prosecutorial decision based on the prior determination of the Pennsylvania Supreme Court excluding certain evidence.

[3] See: Brief for appellant filed in the Supreme Court of Pennsylvania.

3. Did the lower court err in refusing to suppress all alleged oral admissions made to the police by the defendant after defendant indicated that he was the man the police were seeking in connection with the Luthersburg incident?

4. Did the lower court err in refusing to suppress all evidence pertaining to the defendant's station wagon automobile?

5. Did the lower court err in admitting into evidence a pocketknife of the defendant?

6. Did the lower court err in admitting into evidence inflammatory photographs of the deceased and articles of clothing worn by the victim at the time of the alleged homicide?

7. Did the lower court err in refusing defendant's motion for the sequestration of the Commonwealth's witnesses?

8. Did the lower court err in refusing to grant the defendant's points for charge, and particularly those pertaining to the Commonwealth's failure to produce sufficient evidence of a willful, deliberate and premeditated homicide, and failure to prove any deadly weapon in connection with said homicide?

9. Did the lower court err in its instructions to the jury, and particularly in placing undue emphasis on the law governing or concerning murder in the first degree, and failing to adequately cover second degree murder, and in over emphasizing its opinion that the circumstances could not warrant a jury verdict of voluntary manslaughter?

10. Did the lower court err in failing to grant defendant's motion for a mistrial based on inflammatory and prejudicial remarks made by the District Attorney during his closing address to the jury and on the District Attorney's unwarranted speculations to the jury on how the homicide occurred, which speculations were not based on any facts or reasonable inferences from the evidence adduced at trial?

11. Was the verdict in this case contrary to the evidence produced at trial, and contrary to the law applicable to the evidence?

In support of the present petition, Yount alleges that he is entitled to relief for the following reasons:[4]

1. Petitioner's conviction was obtained by a violation of his privilege against self-incrimination through the use of oral statements elicited without required *Miranda* warnings.

2. Petitioner's conviction was obtained in violation of his constitutional right to select and empanel a fair, impartial and "indifferent" petit jury.

3. Petitioner's conviction was obtained in violation of his constitutional right to a fair and impartial trial as a result of the trial court's prejudicial charge to the jury and included erroneous instructions.

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[4] See: Original petition for a writ of habeas corpus filed by Yount in the United States District Court for the Middle District of Pennsylvania, and subsequently transferred to this Court.

After an answer to the petition was filed, counsel was appointed to represent Yount and a status conference held. Following that conference, counsel for the petitioner was granted leave to file an amended petition and the Commonwealth was granted time to reply. In the amended petition, counsel added an allegation that Yount was denied the effective assistance of counsel generally and specifically in that counsel did not adequately prepare supports for the change of venue motion; failed to prepare for and conduct an adequate voir dire; failed to have all proceedings recorded; failed to secure sequestration of witnesses; failed to seek recusal of the trial judge, and failed to meet the standards of adequacy of representation.[5] The matter was then scheduled for an evidentiary hearing.

It is provided in 28 U.S.C. §2254(b) that:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

This statute reflects a codification of the well-established concept which requires that before a federal court will review any allegations raised by a

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[5] See: Amendment to petition for writ of habeas corpus, filed on July 1, 1981.

state prisoner, those allegations must first be presented to that state's highest court for consideration. *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973); *Brown v. Cuyler*, F.2d (3d Cir. No. 81-1968, filed January 29, 1982).

It is only when a petitioner has demonstrated that the available corrective process would be ineffective or futile that the exhaustion requirement will not be imposed. *Preiser v. Rodriguez, supra.; Hallowell v. Keve*, 555 F.2d 103 (3d Cir. 1977).

In the instant case, the issues which the petitioner raised in his original petition for a writ of habeas corpus were raised in his direct appeal to the Pennsylvania Supreme Court and are properly before this Court. However, the issues which counsel seeks to raise in the amended petition were not presented to the courts of the Commonwealth for their initial consideration, and will not be considered here.[6] *Tippett v. Roberts*, 587 F.2d 373 (8th Cir. 1978).

To place matters in proper perspective, the facts of the case are adopted here from the opinion of the Pennsylvania Supreme Court, 455 Pa. at pp. 306-308.

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[6] It should be observed that the issues which counsel has presented specifically raise the issues in the context of the lack of the effective assistance of counsel. Since, as postured, these issues have not been considered by the Pennsylvania courts, they will not be considered in the federal proceeding. However, it should be observed that the core of the issues which counsel seeks to raise, concern the substantive issues which the plaintiff has raised, and which are properly before this Court, and as presented by the plaintiff, the issues will be considered here.

"On April 28, 1966, the body of Pamela Sue Rimer, an eighteen year-old high school student, was discovered in a wooded area near her home in Luthersburg, Pennsylvania. One of her stockings was knotted and tied around her neck. An autopsy revealed that death was caused by strangulation. Further examination disclosed three slashes across the victim's throat and cuts of the fingers of her left hand, inflicted by a sharp instrument, and numerous wounds about her head, caused by a blunt instrument.

"At approximately 5:45 a.m. on the morning of April 29, 1966, appellant, a teacher at the school the deceased had attended, voluntarily appeared at the state police substation in DuBois, Pennsylvania, and rang the doorbell. An officer opened the door and asked whether he could be of assistance. Appellant stated 'I am the man you are looking for.' The officer asked whether he was referring to the 'incident in Luthersburg,' and appellant responded in the affirmative.

"The officer then asked appellant to come into the police station and be seated. Leaving appellant unattended, the officer proceeded to a back bedroom where a detective and another police officer were sleeping, woke them, and informed them that 'there was a man in the front that said we are looking for him.' He then returned to the front office where appellant, who had removed his coat, hat, and gloves, identified himself as Jon Yount.

"After dressing, the detective and the second officer entered the front office. The detective was

told by the first officer that appellant's name was Jon Yount. The detective then asked appellant to be seated inside a smaller office adjacent to the front office, where he asked, 'Why are we looking for you?' Appellant replied, 'I killed that girl.' Upon hearing that answer, the detective inquired, 'What girl', and appellant responded, 'Pamela Rimer.'

"In response to the detective's next question, 'How did you kill this girl?' appellant answered 'I hit her with a wrench and I choked her.' At that point the detective gave appellant admittedly inadequate *Miranda* warnings, and began interrogation as to the details of the crime. A written confession was subsequently obtained.

"Prior to appellant's second trial, the question 'How did you kill this girl?' and its answer, as well as the written confession were suppressed, on the authority of our prior decision, as violative of *Miranda*. The admissibility of appellant's initial statements that the police were looking for him in connection with the Luthersburg incident is not challenged, nor could a challenge be successful. See *Commonwealth v. Miller*, 448 Pa. 114, 121 n.2, 290 A.2d 62, 65 n.2 (1972)."

The petitioner's first contention in support of his claim for habeas corpus relief, is that it was error for the court to permit certain evidence to be heard by the jury. Specifically, he challenges the testimony of State Troopers which related that in the early morning hours of April 29, 1966, the petitioner appeared at the DuBois state police substation and rang the doorbell

(R. 250);[7] that when Trooper Philips answered the bell, the petitioner stated that he was the man they were looking for in conjunction with the Luthersburg incident (R. 250, 251, 256); that Trooper Philips then called other officers into the front room who inquired why they were looking for him and that the petitioner replied that they were seeking him in conjunction with the killing of Pamela Rimer (R. 253, 256-257, 263, 265, 271). Following this revelation, the petitioner was apprised of his *Miranda*[8] rights in a manner which the Pennsylvania Supreme Court found defective, and accordingly ordered the remaining evidence suppressed.[9]

That is, what the petitioner now alleges as improperly admitted at trial, are the statements he initially made to the State Police when he arrived at their barracks and identified himself as the individual they were seeking.

In *Miranda v. Arizona*, *supra.*, the Court held:

> "Confessions remain a proper element in law enforcement... The fundamental import of the privilege ... is not whether [an individual] is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that the police stop a person who enters a police station and states that he wishes to confess to a crime ... Volunteered statements of any kind are not barred by the Fifth Amendment... 384 U.S. at 478.

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[7] All references to the trial transcript are marked "R".

[8] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[9] See: *Commonwealth v. Yount*, 435 Pa. 276 (1969).

The Court further observed:

> "any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." 384 U.S. at 478.

Thus, it must be determined at what point the police became obliged to inform the petitioner of his rights.

In *Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980) the Court held,

> "... the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police."

Thus, *Miranda* is applicable only to custodial interrogations involving matters other than those "normally attendant to arrest and custody".

In *United States v. Mesa*, 638 F.2d 582, 584-585, (3d Cir. 1980), Chief Judge Seitz wrote:

> "*Miranda* warnings are designed to protect against the evils of 'custodial interrogation', and they are not intended to unduly interfere with a

> proper system of law enforcement or to hamper the police's traditional investigatory functions ... Therefore, the warnings need be given only 'when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning,'... Since *Miranda*, the Court has indicated that to determine whether there has been a 'custodial interrogation,' a court must make two discrete inquiries. First, it must determine whether the suspect was in 'custody'.... If the suspect was in 'custody', the court then must decide whether the police interrogated him."

While perhaps not directly on point, but rather similar in circumstances is *United States v. Lam Lek Chong*, 544 F.2d 58, 70 (2d Cir. 1976) in which after being charged with a crime, Chong initiated a series of meetings with a government agent to further his previously expressed desire to cooperate. The Court there held,

> "he freely volunteered the statement at one of a series of meetings which he initiated, and at which he had expressed no desire to have counsel. The government was thus free to make use of the statement at trial."

Or, one might consider the similarity to *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) where the defendant voluntarily came to the police station in response to a request from the police, but was informed that he was not under arrest. In that case, the Court held:

"Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment'. Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody'. It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited."

As applied to the instant facts, it would appear that in the early morning hours of April 29, 1966, the petitioner voluntarily appeared at the police station and related that he believed the police were seeking him. At that juncture, it was only reasonable for the police to inquire as to why the petitioner believed they were seeking him. Only after it became apparent that what the petitioner had related was of moment to the police, did the petitioner's presence become custodial and the *Miranda* warnings become mandated. That is, until such time as the police recognized that the peti-

tioner was present to confess his participation in a crime, did his presence become custodial and warrant the advice of rights as mandated by *Miranda*. On this basis, the petitioner's communication that the police were seeking him in conjunction with the murder of Pamela Sue Rimer was properly admitted.

Another issue which the petitioner raises here is that he was denied a fair trial as a result of the court's prejudicial and erroneous jury instructions. Specifically, the petitioner contends that the trial court unduly emphasized first degree murder rather than murder in general and the penalty which was permissible for first degree murder; that the court charged that malice may be presumed from the use of a weapon against a vital part of a person's body; that evidence of a person's good character can only be weighed in considering guilt or innocence and thereby implying it could not be considered as to state of mind; that the court instructed the jury that there was no basis for a voluntary manslaughter verdict as the petitioner had argued and upon which he based his defense, and that the court acted improperly in stating that it had affirmed all points for charge submitted by the Commonwealth, but had rejected those submitted by the petitioner.

As presented to the Supreme Court of Pennsylvania, the issue was:

> "The trial court erred in refusing to grant the defendant's points for charge and particularly those pertaining to the Commonwealth's failure to prove a deadly weapon in connection with said homicide or to produce sufficient evidence of a willful, deliberate and premeditated homicide.

> "The trial court erred in its instructions to the jury, and particularly in placing undue emphasis on the law governing or concerning murder in the first degree, and failing to adequately cover second degree murder; and in over-emphasizing its opinion to the effect that the circumstances of the case could not warrant a jury verdict of voluntary manslaughter."[10]

In reviewing jury instructions, those instructions must be considered as an entity and no undue attention focused on any particular aspects of those instructions. *Henderson v. Kibbe*, 431 U.S. 145 (1977); *Cupp v. Naughten*, 414 U.S. 141 (1973); *Martin v. Warden*, 653 F.2d 799 (3d Cir. 1981) cert. denied U.S. (1982).

During its charge to the jury, the court delivered preliminary instructions and then read the definition of murder (R. 423-424, 436). First the jury was specifically instructed as to the elements of first degree murder, and then informed, as the statute then mandated, that all other murder shall be murder in the second degree (R. 426, 436). The court then instructed that under the circumstances voluntary manslaughter was not a permissible verdict (R. 426, 436). However, the court quickly corrected this error and stated that although in the opinion of the court there was no showing of voluntary manslaughter, the opinion of the court was not binding on the jury and that the jury could return a voluntary manslaughter verdict (R. 428,

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[10] See: Page 53-62 of brief for petitioner-appellant filed in the Supreme Court of Pennsylvania at No. 357 January Term, 1973.

429, 436, 439). Voluntary manslaughter was also defined (R. 428). Thus, the court instructed on all permissible verdicts and while perhaps improperly expressing its opinion as to whether or not a verdict of voluntary manslaughter was justified, immediately corrected this error and stated that it was within the province of the jury to reach such a verdict.

When viewed as an entity, it cannot be said that the jury instructions were so prejudicial as to deny the petitioner a fair trial.

The petitioner also objects to the failure of the trial court to instruct the jury as requested. This issue, as presented to the Pennsylvania Supreme Court challenged the trial court's denial of a requested instruction,

> "The Commonwealth has failed to prove any deadly weapon which bears any connection with the death of Pamela Sue Rimer."[11]

The evidence produced at trial disclosed that the victim died as a result of cuts to the neck, aspiration of blood, and skull and brain injuries (R. 234). There is no attempt on the part of the Commonwealth to prove death by any specific instrumentality. Thus, such an instruction was not required. *Bishop v. Mazurkiewicz*, 634 F.2d 724 (3d Cir. 1980), cert. denied 101 S.Ct. 3053 (1981).

The final issue which the petitioner seeks to raise here is whether or not his right to a fair, impartial and "indifferent" jury was violated.

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[11] See: Page 53 of brief for petitioner-appellant filed in the Pennsylvania Supreme Court.

Jury selection commenced on November 4, 1970 for the purpose of seating twelve jurors and two alternates. The selection process fills over eleven hundred pages of transcript, and was not completed until November 16, 1970 after 168 persons were voir dired. We have carefully studied the voir dire examination and from that study have reached several conclusions.

The parties have stipulated that in 1970, Clearfield County had a population of 74,619, and that there were two newspapers in general circulation within the county.[12] In addition, there were a very limited number of radio and television stations of local origin.

Following the homicide and the subsequent surrender of the petitioner, his confession and ultimate trial and conviction were given extensive coverage by the news media. When an attempt was made to impanel a jury for the second trial, almost without exception the veniremen stated that four years previously, when the original trial was held, they had read about it extensively in the newspapers and heard detailed reports on the radio and television. Almost all of these people had also heard discussions of the case, and heard people express their opinions concerning the case, and in many cases had expressed their own opinions.

Of the one hundred-sixty-eight persons called, one hundred and one, or sixty percent stated that they had

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[12] It was agreed that the two papers in general circulation in Clearfield County were the Clearfield Progress and the DuBois Express. The former had a circulation of 16,250 and the latter had a circulation of 9,500.

firmly fixed opinions which could not be changed regardless of what evidence was presented.[13] Another nineteen individuals or eleven percent stated that while they had fixed opinions they would be able to change those opinions if the petitioner-defendant

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[13] Reference to the voir dire transcript are marked "T". Those individuals having fixed opinions were: Eckley (T. 12); Felix (T. 16); Kiphart (T. 50); Shiner (T. 52); Habasevich (T. 56-57); Hensal (T. 72, 74); Jay (T. 77-78); Anderson (T. 137); Youngren (T. 148); Frelin (T. 201); Clever (T. 217); Carouso (T. 221); Way (T. 223); Kolbe (T. 228); Gluczyk (T. 229); Wells (T. 232); Baer (T. 236-237); Holmes (T. 240); Jacobson (T. 242); Eshelman (T. 252); Woods (T. 254); Yeschke (T. 262); Thompson (T. 264); Spinelli (T. 268); Snyder (T. 279); Phillips (T. 281); Hoover (T. 294); Bowman (T. 302); Nordberg (T. 303); McPherson (T. 307-308); Shaw (T. 324); Shedlock (T. 326); Gorman (T. 330); Fyock (T. 335); Way (T. 340); Laman (T. 343); Cossick (T. 346-347); Evans (T. 348); Flick (T. 352); Rush (T. 354); Collins (T. 358); Riley (T. 360); Mahlon (T. 365); Solava (T. 366); DePerro (T. 437); Kuhn (T. 468, 470); Morgan (T. 482-483); Derck (T. 484); Narehood (T. 488); Decker (T. 490); Aughenbaugh (T. 493); Curry (T. 496); Cowder (T. 499); Curley (T. 504, 507); Lightner (T. 511); Lynn (T. 514); Johnson (T. 531); Frankdouser (T. 548); Benedek (T. 552); Decker (T. 554); Anderson (T. 557); Baird (T. 558-559); Schroeder (T. 588); Andrews (T. 589-590); Bish (T. 593); Larson (T. 696); Henninger (T. 699-705); Sekula (T. 708); Hall (T. 710-711); Carr (T. 730-731); Hepfer (T. 733); Sanker (T. 738-740); Morince (T. 744); Sandri (T. 783-784); McClure (T. 850); Tibbins (T. 852); Westover (T. 865); Bowman (T. 869); Challingsworth (T. 873); Rougeux (T. 884); Ruch (T. 919-920); Shaffer (T. 938); McGonigal (T. 968); Bontempo (T. 1003); Fye (T. 1016); Accordino (T. 1021); Bonsall (T. 1022-23); Turner (T. 1027-28); Hodge (T. 1031); Hudson (T. 1038); McDonald (T. 1041); Briskar (T. 1044); Ellinger (T. 1047); Heilbrun (T. 1052); Blimmel (T. 1053); Leigey (T. 1057); Henry (T. 1059); Stoyek (T. 1087); Gross (T. 1094, 1097); Turley (T. 1102), and Lender (T. 1160).

would be able to convince them to do so.[14] That is, they would require affirmative testimony on the part of the defendant to convince them to change their opinion as to his guilt. Finally, two individuals stated that although they had somewhat fixed opinions, they believed they would be able to listen to the case with an open mind.[15] Thus, over seventy percent of the persons called testified that they had a fixed opinion as to the petitioner-defendant's guilt although some of those persons were willing to change that opinion if they could be convinced to do so.

In *Smith v. Phillips*, U.S. (No. 80-1082, filed January 25, 1982, slip opinion at p. 8) the Court noted:

> "The safeguards of juror impartiality such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a juror capable and willing to decide the case solely on the evidence before it..."

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[14] Those persons having fixed opinions who stated that they could change their opinion if the petitioner-defendant could convince them to do so were: Krapf (T. 39); Habasevich (T. 60-61); Pfaff (T. 79, 84); Mathews (T. 107); Turner (T. 247); Black (T. 273); Burkett (T. 380); McCall (T. 464); Carter (T. 501-502); Bernick (T. 584); Ellenberger (T. 751); Polkinghorn (T. 756-760); Swisher (T. 892); Decker (T. 897-902); Merritt (T. 975-984); Cowfer (T. 1078-1080); Ford (T. 1106-1109); Hudson (T. 1114-1115), and Chincharick (T. 1170).

[15] Those persons having somewhat fixed opinions but willing to listen with an open mind were: Hren (T. 442-445) and Iraine (T. 477-478).

Thus, in this context, it must be determined whether or not the jurors were able to disregard their prior exposure and beliefs and base their verdict solely on the evidence and law presented in the courtroom.

The parties concede that there was extensive publicity at the time of the crime, when the petitioner confessed to having committed the crime, and surrounding his first trial and conviction. Apparently, the second trial which occurred about four years later was surrounded with publicity, but not to the same degree which originally occurred. Nevertheless, it does appear that at this late date, fifteen years after the crime, there is considerable public feeling in Clearfield County in opposition to the petitioner.[16]

In *Martin v. Warden*, *supra* at p. 805 the Court held:

> "A state court conviction may be overturned in a habeas proceeding only where the defendant shows that the publicity had been so extreme as to cause actual prejudice to a degree rendering a fair trial impossible or that the press coverage has 'utterly corrupted' the trial."

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[16] We note that at the federal evidentiary hearing testimony was presented which indicated that whenever the petitioner applies for parole, considerable community interest is invoked in opposition to the granting of his petition. Specifically, petitions are circulated at local shopping malls, and newspaper articles appear in opposition to the parole. In addition, when the evidentiary hearing was scheduled in this court, the local papers reported that fact, and the court received an *ex parte* communication from one local resident in opposition to granting any form of relief to Yount.

The Court in *Martin* stated further:

> "Even if a juror has heard about a case and has read allegations of a defendant's guilt, the juror nonetheless may serve if he or she is capable of laying aside prior impressions and rendering a fair verdict based upon the evidence presented at trial." 653 F.2d at 804.

That is, in reviewing a state court proceeding in a federal habeas corpus action, the federal court is limited to a determination of whether or not the veniremen were so tainted as to render it impossible for a defendant to receive a fair trial.[17]

The record in this case discloses that essentially all members of the venire had been exposed to publicity concerning the murder and trial of the petitioner. In addition, most conceded that they had heard individuals express opinions concerning the petitioner's guilt. Nevertheless, in our contemporary society, it would appear unlikely that any adult individual living in a small rural community could have avoided exposure to a sensational murder occurring within that society. Nevertheless, exposure is not the test of prejudice, rather it must be determined whether those individuals who were called to serve on the jury were

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[17] The federal standard in reviewing a state court conviction is different from that utilized in determining the propriety of a federal conviction. In the latter instance, the appellate courts may in the exercise of their supervisory power, presume a high potential for prejudice and order a new trial. However, when reviewing a state court proceeding, the demonstration of prejudice must be of constitutional magnitude. *Martin v. Warden*, *supra* at pp. 804-805.

capable of laying aside those matters which they had heard and read, and reaching a verdict based solely on the evidence and the law as presented in the trial court. *Martin v. Warden, supra.* Thus, one must examine each of the jurors who were ultimately selected in order to determine whether or not he or she could impartially and fairly judge the evidence.

Juror number 11,[18] Hoover, testified that he had read about the case and heard it discussed, but that he had no opinion on the merits (R. 64-65). Juror number 28, Clapsaddle, testified that she had read and heard about the case; that she had formed an opinion about the case but that opinion was not firm, and that she had discussed the case with others (R. 205-207). Juror number 68, Yorke, testified that he had moved to the community fairly recently and that he was not familiar with the case (R. 369-370). Juror number 72, Waple, testified that she had read and heard about the case, but had no opinion about it (R. 409-412). Juror number 75, Hren, testified that he was familiar with the case, had formed an opinion about the case, and wss not certain he could ignore that opinion; that he would require evidence to alter that opinion, but believed that he could judge the case with an open mind (R. 440-455). Juror number 100, Karetski, testified that he was familiar with the case; that at the time of the original trial he had an opinion about that case, that at the time of the retrial he was not certain

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[18] The references to "juror number" refer to the order in which each member who was ultimately seated as a juror was called from the venire. That is, the number is actually the position which that individual occupied in the venire.

of the merits of that former opinion, and that he believed he did not have any opinion (R. 560-562).

The next juror seated, juror number 120, Hummel, testified that she was familiar with the case but did not have an opinion about it (R. 787-788). Juror number 122, Parks, testified that she had read about the case (R. 813). Juror number 126, Undercoffer, testified that he was familiar with the case but that he did not hold any opinion (R. 855-857). Juror number 135, Murphy, testified that he had heard and read about the case but that he had no opinion (R. 922-924). Juror number 141, Kurtz, had read about the case and had no opinion about it (R. 988-990). It should be observed that at that juncture the defense had exhausted it peremptory challenges (R. 999). However, because another already seated juror had to be excused due to a death in her family, additional challenges were granted. The twelfth juror, juror number 164, Harchak, testified that he had read about the case occasionally but had not formed an opinion (R. 1119-1121).

Finally, two alternates were selected, Juror number 167, Chicharick, had read about the case, and had a fixed opinion, however, he believed that if evidence was presented he could be convinced to change that opinion (R. 1165-1170). Juror number 168, Pyott, testified that she had read and heard about the case; that she had an opinion but that if proper evidence was presented she could change that opinion (R. 1179-1181). Again, at that juncture, the defense had exhausted its peremptory challenges.

In an effort to demonstrate that the prejudice which had infected the community was more wide-

spread than the voir dire demonstrated, at the federal hearing, Constance Ives was called to testify. Mrs. Ives testified that her father-in-law had been called as part of the venire and although he had privately expressed a negative opinion about the petitioner, when called upon and examined in voir dire, he testified that he had no fixed opinion (R. 807). However, Mr. Ives was not seated as a juror.

In *United States v. Wood*, 299 U.S. 123, 145-146 (1936), the Court stated:

> "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."

In reversing the conviction in *Irvin v. Dowd*, 366 U.S. 717, 727 (1961), the Court observed,

> "The [venire] panel consisted of 430 persons. The court itself excused 268 of those on challenges for cause as having fixed opinions as to the guilt of petitioner; 103 were excused because of conscientious objection to the imposition of the death penalty; 20, the maximum allowed, were preemptorily challenged by the petitioner and 10 by the State; 12 persons and two alternates were selected as jurors and the rest were excused on personal grounds... 90% of those examined on the point... entertained some opinion as to guilt...
>
> "...the *voir dire* examination of a majority of the jurors finally placed in the jury box. Eight out of the 12 thought petitioner was guilty. With such

an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man."

When one considers the large proportion of the veniremen who when called, testified under oath that they had fixed opinions concerning the case, and couples this with the fact that several of those selected as jurors candidly admitted that they held opinions concerning the guilt of the petitioner but were willing to be convinced otherwise, a certain pall is cast upon those in the minority who testified that they had not formed a fixed opinion and could judge the case on its merits.

Thus, it would appear that where in the circumstances of this case, a sensational homicide occurs in a rural community, and the public has been fully informed of the fact that the charged defendant had confessed to the crime, and that he had been previously tried and convicted of both rape and murder, and where on retrial the confession is suppressed but the public remains very much aware of the circumstances surrounding the case and has formed definite opinions as to the guilt or innocence of the defendant, it is a violation of the defendant's Sixth Amendment rights to be subject to retrial before his community peers.

To repeat what has been previously stated,

"The safeguards of juror impartiality such as *voir dire* and protective instructions from the trial

> judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it..." *Smith v. Phillips, supra.*

Given the pervasive community knowledge of the facts of this case and the prevailing opinion as to Yount's guilt, as well as the strong community hostility towards the petitioner, it does not appear that the empanelled jury was "capable and willing to decide the case solely on the evidence before it" but rather at best required the petitioner to prove his innocence or at least overcome strong preconceived notions as to his guilt. Under such circumstances, it does not appear that the Sixth Amendment mandate of a fair and impartial jury could have been met in the small rural community of Clearfield County.

Accordingly, it is respectfully recommended that the petition of Jon E. Yount for a writ of habeas corpus be granted and that he be discharged from custody unless, within sixty (60) days, the Commonwealth retries him under circumstances that will assure a fair and impartial jury.

Respectfully submitted,
(s) Robert C. Mitchell
ROBERT C. MITCHELL

February 12 1982

ORDER
[Caption Omitted]

AND NOW, this 12th day of February, 1982, the Magistrate's Report and Recommendation having been filed,

IT IS ORDERED that the parties shall have ten (10) days in which to file objections to said Report and Recommendation.

(s) Robert C. Mitchell
ROBERT C. MITCHELL
United States Magistrate

RESPONDENT'S OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION

[Caption Omitted]

AND NOW, comes the Commonwealth of Pennsylvania by F. CORTEZ BELL, III, Esquire, Assistant District Attorney of Clearfield County, and sets forth the Respondent's objections to the Magistrate's Report and Recommendation as follows:

I. Procedural History of Case

Petitioner, Jon E. Yount, was arrested April 29, 1966, on charges of Murder and Rape filed to No. 2 May Sessions 1966 in the Court of Quarter Sessions of Clearfield County, Pennsylvania. The case proceeded to trial on September 28, 1966, and on October 7, 1966 the Petitioner was pronounced guilty by jury verdict of Murder of the first degree and Rape. Following the denial of post-trial motions, Petitioner appealed from the judgment of sentence to the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania reversed the conviction and ordered a new trial on the basis of *Miranda vs. State of Arizona*, 384 U.S. 436 (1966) which had been decided in the period of time between the date of Petitioner's arrest and the date of trial. *Commonwealth vs. Yount*, 435 Pa. 276, 256 A.2d 464 (1968).

Prior to retrial, hearings were held on or about June 4, 1970, July 29, 1970 and August 17, 1970 with regard to Petitioner's pre-trial motions as to Change of

Venue and Suppression of Confession and Evidence Obtained Therefrom. The Court by Memorandum and Order filed September 21, 1970 denied the Change of Venue request and indicated that it would be bound by the guidelines as to suppression of evidence as set forth by the Supreme Court of Pennsylvania in its opinion rendered in the instant case found at *Commonwealth vs. Yount*, 435 Pa. 276, 256 A.2d 464 (1969) *cert. denied*, 397 U.S. 925 (1970). A second Petition for Change of Venue was filed November 13, 1970 during jury selection for the instant case, but was denied by Memorandum and Order of the Court dated November 14, 1970.

Jury selection for the retrial commenced November 4, 1970, with the actual trial beginning on November 17, 1970. On November 20, 1970 the jury in the instant matter returned a verdict of guilty of Murder of the first degree. The Rape charge was not tried by the Commonwealth at retrial. The Petitioner was formally sentenced March 26, 1973 and appealed to the Supreme Court of Pennsylvania. That Court by opinion found at *Commonwealth vs. Yount*, 455 Pa. 303, 314 A.2d 242 (1974) affirmed the judgment of sentence.

The Petitioner, pursuant to 28 U.S.C. §2254, filed a Petition for Writ of Habeas Corpus pro se on or about January 5, 1981. The Respondents filed an Answer on or about March 24, 1981. Subsequent to that date the Office of the Federal Public Defender was appointed to represent the Petitioner. An Amended Petition for Writ of Habeas Corpus was filed on or about July 1, 1981, with the Respondents filing an Amended Answer on or about August 14, 1981.

Evidentiary hearings were held on November 3, 1981 and December 28, 1981, at which time both parties placed testimony on record with regard to the merits of the Petition.

On February 12, 1982, the Honorable Robert C. Mitchell, United States Magistrate, recommended that a Writ of Habeas Corpus issue on the basis that: "Given the pervasive community knowledge of the facts of this case and the prevailing opinion as to Yount's guilt, as well as the strong community hostility towards the petitioner, it does not appear that the empanelled jury was 'capable and willing to decide the case solely on the evidence before it' but rather at best required the petitioner to prove his innocence or at least overcome strong preconceived notions as to his guilt." *Magistrate's Report and Recommendation* at page 18.

II. Objections to Magistrate's Report and Recommendations

The law seems well established in the Commonwealth of Pennsylvania that a motion for change of venue is addressed to the Trial Court's discretion. The theory being that the Trial Court is in the best position to assess the community atmosphere and publicity surrounding the trial. A decision by the Trial Court will not be disturbed on appeal absent a showing of an abuse of discretion. *Commonwealth vs. Tolassi*, 480 Pa. 41, 413 A.2d 1003, 1007 (1980); *Commonwealth vs. Rigler*, 488 Pa. 441, 412 A.2d 846, 850 (1980); *Commonwealth vs. Heath*, 275 Pa. Super. 478, 419 A.2d 1, 4-5 (1980). Such was also the state of the law at the time of Petitioner's trials in 1966 and 1970.

Commonwealth vs. Swanson, 432 Pa. 293, 248 A.2d 12 (1968); *Commonwealth vs. Green*, 396 Pa. 137, 151 A.2d 241 (1959); *Commonwealth vs. Richardson*, 392 A.2d 528, 140 A.2d 828 (1958).

Petitioner, at the conclusion of the 1970 retrial, presented the issue as to pre-trial publicity and change of venue as one of his basis for appeal to the Pennsylvania Supreme Court. That Court in its opinion at *Commonwealth vs. Yount*, 455 Pa. 303, 314 A.2d 242, 247-248 (1974) stated: "These findings (no excessive pre-trial publicity) fully supported by the record, do not sustain appellant's claim, and the Court properly denied appellant's motion for a change of venue predicated on this theory. *Commonwealth vs. Pierce*, 451 Pa. 190, 303 A.2d 209 *cert denied*, 414 U.S. 878, 94 S.Ct. 164, 38 L.Ed.2d 124 (1973); *Commonwealth vs. Johnson*, 440 Pa. 342, 269 A.2d 752 (1970)." Petitioner further argued before the Pennsylvania Supreme Court that the community as a whole was so prejudiced against him that it would be impossible for veniremen to set aside their feelings and grant him a fair trial. The Supreme Court in response to this assertion held: "Neither does the voir dire, as appellant argues, reveal a 'clear and convincing' build-up of prejudice or a 'pattern of deep and bitter prejudice' shown ... 'throughout the community' which would require a change of venue. *Irvin vs. Dowd*, 366 U.S. 717, 725, 727, 81 S.Ct. 1639, 1644, 1645, 6 L.Ed.2d 751 (1961). See *Commonwealth vs. Hoss*, 445 Pa. 98, 103-07, 283 A.2d 58, 61-63 (1971); *Commonwealth vs. Swanson*, 432 Pa. 293, 248 A.2d 12 (1968) *cert. denied*, 394 U.S. 949, 89 S.Ct. 1287, 22 L.Ed.2d 483 (1969)." *Commonwealth vs. Yount*, 455 Pa. 303, 314

A.2d 242, 247 (1974). The Supreme Court of Pennsylvania held that upon reviewing the record before it, the Trial Court had not abused its discretion in denying Petitioner's change of venue motions.

The Federal Courts follow similar guidelines with regard to the review of change of venue decisions within that Court system. "Generally, a motion for a change of venue is addressed to the discretion of the trial court and a refusal to grant such a motion will not be set aside absent an abuse of discretion. *United States vs. Addonizio*, 451 F.2d 49, 61 (3d Cir.), *cert. denied*, 405 U.S. 936, 92 S.Ct. 949, 30 L.Ed.2d 812 (1972); *Commonwealth vs. Rolison*, 473 Pa. 261, 266, 374 A.2d 509, 511 (1977)." *Martin vs. Warden*, 653 F.2d 799, 804 (3d Cir. 1981). However, when reviewing an assertion as to pre-trial publicity and change of venue in a habeas corpus proceeding from a state conviction, the federal court's review narrows considerably. "A state court conviction may be overturned in a habeas proceeding *only* where the defendant shows that the publicity had been so extreme as to cause actual prejudice to a degree rendering a fair trial impossible or that the press coverage has 'utterly corrupted' the trial. (Emphasis added). *Murphy vs. Florida*, 421 U.S. 794, 798, 95 S.Ct. 2031, 2035, 44 L.Ed.2d 589 (1974). See also *Dobbert vs. Florida*, 432 U.S. 282, 303, 97 S.Ct. 2290, 2303, 53 L.Ed.2d 344 (1977)." *Martin vs. Warden*, 653 F.2d 799, 805 (3d Cir. 1981).

"Pre-trial publicity exposure will not automatically taint a juror." *United States vs. Provenzano*, 620 F.2d 985, 995 (3d Cir.) *cert. denied*, U.S. , 101 S.Ct. 267, 66 L.Ed.2d 129 (1980). Accord, *United*

States vs. Feliziani, 472 F.Supp. 1037, 1044 (E.D. Pa. 1979) *affirmed*, 622 F.2d 580 (3d Cir. 1980); *Martin vs. Warden*, 653 F.2d 799, 804 (3d Cir. 1981). "Even if a juror has heard about a case and has read allegations of a defendant's guilt, the juror nonetheless may serve if he or she is capable of laying aside prior impressions and rendering a fair verdict based on the evidence presented at trial." *United States vs. Provenzano*, 620 F.2d 985, 995 (3d Cir.) *cert. denied*, U.S. , 101 S.Ct. 267, 66 L.Ed.2d 129 (1980); *Martin vs. Warden*, 653 F.2d 799, 804 (3d Cir. 1981).

With regard to the instant case, the record of voir dire at the second trial indicates that of the twelve (12) jurors who actually served on the panel, which heard Petitioner's case, nine (9) were accepted for the jury by both the Commonwealth and the defense *without challenges of any form* being made. Each one of these nine persons indicated that they had no opinion as to Petitioner's guilt or innocence. (Hoover, Clapsaddle, Yorke, Waple, Karetski, Hummell, Parks, Undercoffer, Murphy). Of the three (3) persons who were challenged, two (2) indicated they had no opinion whatsoever (Kurtz, Harchak) and the remaining one (1), although stating he had an opinion, indicated he would enter the jury box with an open mind and that his verdict would be based on the evidence presented at trial. (Hrin).

Even though the record of voir dire establishes that the jurors were unprejudiced and nothing to refute such a finding was introduced at the evidentiary hearings held before the Magistrate, the Report and Recommendation clearly indicates the feelings of the Magistrate that the sworn testimony of the jury panel

should be set aside. This finding is based upon the Magistrate's opinion that "Given the pervasive community knowledge of the facts of this case and the prevailing opinion as to Yount's guilt, as well as the strong community hostility towards the petitioner, it does not appear that the empanelled jury was 'capable and willing to decide the case solely on the evidence before it' but rather at best required the petitioner to prove his innocence or at least overcome strong preconceived notions as to his guilt." *Magistrate's Report and Recommendation*, p. 18. It is apparent that the Magistrate, by his holding, is applying the standards originally set forth in *Marshall vs. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959). The *Marshall* standard clearly allows for a federal court to find that when persons learn from news sources information with a high potential for prejudice such persons may be presumed to be prejudiced despite their assurances that they could remain impartial. Under the federal system, the representations of the jury members at Petitioner's trial, even though under oath, may be set aside.

The *Marshall* standard, however, is wholly inapplicable to a state court proceeding. *Murphy vs. Florida*, 421 U.S. 794, 798, 95 S.Ct. 2031, 2035, 44 L.Ed.2d 589 (1975); *Martin vs. Warden*, 653 F.2d 799, 804-805 (3d Cir. 1981). Justice Marshall in *Murphy* stated: "In the face of so clear a statement, it cannot be maintained that *Marshall* was a constitutional ruling now applicable, through the Fourteenth Amendment, to the States ... We cannot agree that *Marshall* has any application beyond the federal courts." *Murphy vs. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 2035, 44 L.Ed.2d 589 (1975).

Therefore, the sworn testimony of the jurors as to their ability to remain impartial may not be disregarded. The record before the Magistrate is such that no evidence was presented to refute the assertions made by the jurors as to their ability to decide the case on its merits. The evidence presented as to publicity about the instant case, although indicating that the case was indeed publicized, does not evidence any form of insensitive and active official involvement in its promotion or propagation. There is simply no basis upon which a presumption of prejudice of jurors could arise such that their unrefuted sworn testimony may so easily be disregarded.

Conclusion

On the basis of the foregoing arguments, it is respectfully requested that the Magistrate's Report and Recommendation that a Writ of Habeas Corpus be issued directing that Petitioner be retried within sixty (60) days be denied and that the Court dismiss the Petition of Jon E. Yount for Writ of Habeas Corpus.

Respectfully submitted,
F. Cortez Bell, III, Esquire
Assistant District Attorney
[Certificate of Service Omitted]

AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS AND AMENDED PETITION FOR WRIT OF HABEAS CORPUS

[Caption Omitted]

AND NOW comes the Petitioner, Jon E. Yount, by his attorney, George E. Schumacher, Federal Public Defender, and files this Amendment to petitioner's original Petition for Writ of Habeas Corpus and the Amended Petition for Writ of Habeas Corpus filed July 1, 1981, and avers the following:

1. Jon E. Yount filed a Petition for Writ of Habeas Corpus, in forma pauperis, in the United States District Court for the Middle District of Pennsylvania, which was transferred to this Court pursuant to the provisions of Section 2241(d) of Title 28, United States Code.

2. The respondents filed a timely Answer to the Petition for Writ of Habeas Corpus, on March 24, 1981.

3. On April 16, 1981 the Federal Public Defender's Office was appointed to represent the petitioner.

4. On July 1, 1981 an Amendment was filed to the petitioner's Petition for Writ of Habeas Corpus.

5. The respondents filed an Answer to the Amended Petition for Writ of Habeas Corpus on August 14, 1981.

6. Hearings on the Petition for Writ of Habeas Corpus were held before the Hon. Robert C. Mitchell, United States Magistrate, on November 3, 1981 and December 28, 1981.

7. On February 12, 1982 Magistrate Robert C. Mitchell filed his Magistrate's Report And Recommendation, recommending that the petition of Jon E. Yount for a writ of habeas corpus be granted and that he be discharged from custody unless, within sixty days, the Commonwealth retries him under circumstances that will assure a fair and impartial jury.

8. Respondents' Objections to Magistrate's Report and Recommendation were filed on February 23, 1982.

9. Petition, Jon E. Yount, files this Amendment to exclude those portions of his Petition for Writ of Habeas Corpus and Amended Petition for Writ of Habeas Corpus filed July 1, 1981 which were not exhausted in the state court, including, but not limited to, Paragraphs 12-C(a), 12-C(b), 12-C(c), 12-C(d), 12-C(e), 12-C(f) and 12-D. As well as subparagraphs 1, 2, 3 and 4(a) through (f) of the Amended Petition.

10. In a telephone conversation on March 10, 1982, the petitioner, Jon E. Yount, conferred with the Federal Public Defender's Office and consented to the deletion of any and all claims made in his Petition for Writ of Habeas Corpus and Amended Petition for Writ of Habeas Corpus which were not exhausted in the state court.

WHEREFORE, petitioner, Jon E. Yount, respectfully requests this Honorable Court to grant the exclusion of those portions of his Petition for Writ of

Habeas Corpus and Amended Petition for Writ of Habeas Corpus which were not exhausted in the state court.

Respectfully submitted,
(s) George E. Schumacher
George E. Schumacher
Federal Public Defender
Attorney for Petitioner
Jon E. Yount

March 10, 1982

George E. Schumacher, Esq.
Federal Public Defender
590 Centre City Towers
Pittsburgh, Pa. 15222

RE: *Yount v. Bartle*, C.A. 81-234

Dear Mr. Schumacher:

In order to facilitate the final disposition of my Petition for Writ of Habeas Corpus now under review by the United States District Court for the Western District of Pennsylvania, I authorize you, as my appointed counsel-of-record in the above-captioned case, to further amend said Petition for Writ of Habeas Corpus in the following manner:

1. To delete paragraph 12-D, as filed on July 1, 1981, in its entirety; and,

2. To delete whatever subsections of paragraph 12-C (a,b,c,d,e,f), as contained in the original petition filed on January 5, 1981, as you

determine require deletion in order to expidite the final resolution of this case.

I give this authorization with the full knowledge that by so doing I have waived future consideration of these issues by the federal courts of the United States.

Sincerely,
(s) Jon E. Yount
Jon E. Yount, Petitioner
P. O. Box 200; C-8297
Camp Hill, Pa. 17011

DATED: March 10, 1982

(1) (s) R. Delhavir — March 10, 1982
Witness — Date

(2) (s) John R. Krall — 3/10/82
Witness — Date

ORDER OF COURT
[Caption Omitted]

AND NOW, to-wit, this 31st day of March, 1982, upon consideration of Petition, Jon E. Yount's, within Amendment to Petition for Writ of Habeas Corpus and Amended Petition for Writ of Habeas Corpus, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that those portions of petitioner's Petition for Writ of Habeas Corpus and Amended Petition for Writ of Habeas Corpus which were not exhausted in

the state court, including, but not limited to, Paragraphs 12-C(a), 12-C(b), 12-C(c), 12-C(d), 12-C(e), 12-C(f) and 12-D, as well as subparagraphs 1, 2, 3 and 4(a) through (f) of the Amended Petition, be and the same are hereby excluded from the allegations made in his petition for writ of habeas corpus.

(s) Donald E. Ziegler
United States District Judge

Jon E. YOUNT, Petitioner,

v.

Ernest S. PATTON, Superintendent SCI—Camp Hill, and Harvey Bartle III, Attorney General of the Commonwealth of Pennsylvania, Respondents.

Civ. A. No. 81-234.

UNITED STATES DISTRICT COURT,
W. D. Pennsylvania.

April 22, 1982

[537 F. Supp. 873 (1982)]

OPINION

ZIEGLER, District Judge.

Presently before the court is the petition of Jon E. Yount for a writ of habeas corpus alleging that his state court conviction of first degree murder is constitutionally infirm. We hold that Yount has failed to establish a violation of the Due Process Clause of the Fourteenth Amendment and therefore relief will be denied.

I. *History of Case*

Petitioner was indicted for the crimes of murder and rape at No. 2 May Sessions 1966 in the Court of Common Pleas of Clearfield County, Pennsylvania.

On October 7, 1966, he was convicted by a jury of first degree murder and rape and an appeal was taken from the judgment of sentence. The Supreme Court of Pennsylvania reversed and granted a new trial. *Commonwealth v. Yount*, 435 Pa. 276, 256 A.2d 464 (1969), *cert. denied*, 397 U.S. 925, 90 S.Ct. 918, 25 L.Ed. 2d 104 (1970). The prosecutor dismissed the rape charge prior to re-trial and, following selection of a jury, Yount was again convicted of first degree murder. A life sentence was imposed. An appeal was taken.

The Supreme Court of Pennsylvania unanimously affirmed the judgment in *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242 (1974), and petitioner filed the instant pro se action, pursuant to 28 U.S.C. §2254, advancing three issues. Counsel was appointed and filed an amendment to the petition with additional contentions. On March 2, 1982, the Supreme Court of the United States announced its decision in *Rose v. Lundy*, U.S. , 102 S.Ct. 1198, 71 L.Ed. 2d 379 (1982). Counsel for petitioner then filed a motion to amend the original and amended petitions to comply with the teachings of *Rose*. There the Supreme Court explained "that a district court must dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." U.S. at , 102 S.Ct. at 1199.

On March 31, 1982, this court granted Yount's motion to delete from the original petition paragraphs 12-C (a), 12-C(b), 12-C(c), 12-C(d), 12-C(e), 12-C(f) and 12 D, as well as subparagraphs 1, 2, 3 and 4(a) through (f) of the amended petition. Thus we are required to

decide the three issues raised by Yount at paragraphs 12-A, 12-B and 12 C of the original petition, since it is clear that he has exhausted the remedies available to him in the courts of Pennsylvania. See, *Brown v. Cuyler*, 669 F.2d 155 (3d Cir. 1982).

This court is limited to those issues because as *Rose* and *Brown* make clear we may consider only claims that have been exhausted in state court. In *Yount II* Justice Roberts, speaking for the Court, specifically addressed the issues raised in paragraphs 12-A, 12-B and 12-C of the original petition. We need not decide, of course, whether Yount may be precluded by Habeas Corpus Rule 9(b), 28 U.S.C. §2254, from pursuing subsequent federal petitions by seeking speedy federal review of the exhausted claims. But see, *Rose v. Lundy*, U.S. at - , 102 S.Ct. at 1203-1205. In sum, we hold that petitioner has exhausted his state court remedies as required by 28 U.S.C. §2254 (1976) with respect to the three challenges set forth in the original petition for habeas relief.

II. *Discussion*

Yount's original petition was referred to a magistrate of this court for consideration of the following allegations:

> 12-A. Petitioner's conviction was obtained by a violation of his privilege against self-incrimination through the use of oral statements elicited without required *Miranda* warnings.
>
> 12-B. Petitioner's conviction was obtained in violation of his constitutional right to select and empanel a fair, impartial and "indifferent" petit jury.
>
> 12-C. Petitioner's conviction was obtained in violation of his constitutional right to a fair and im-

partial trial as a result of trial court prejudicial charge to the jury and included erroneous instructions.

The magistrate issued a report and recommendation in which he found no constitutional transgression with respect to contentions 12-A and 12-C. We agree with those findings and therefore we will adopt and incorporate as the opinion of the court the findings of the magistrate as to those allegations of the original petition. We reject, however, the recommendation of the magistrate that a writ be granted and Jon Yount discharged from custody unless, within 60 days, a new trial is granted, predicated on a violation of the Due Process Clause of the Fourteenth Amendment, because petitioner was allegedly denied a fair and impartial jury.

Our starting point must be the recent pronouncement of the Supreme Court concerning the ambit of our authority to reverse this state court judgment.

> A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provision of the United States Constitution. As we said in *Cupp v. Naughten,* 414 U.S. 141, 146 [94 S.Ct. 396, 400, 38 L.Ed. 2d 368] (1973): "Before a federal court may overturn a conviction resulting from a state trial . . . it must be established not merely that the [State's action] is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment."
>
> Absent such a constitutional violation, it was error for the lower courts in this case to order a new trial. . . . Federal courts hold no supervisory authority over

> state judicial proceedings and may intervene only to correct wrongs of constitutional dimension. *Chandler v. Florida*, 449 U.S. [560] at 570, 582-583 [101 S.Ct. 802 at 807, 813-814, 66 L.Ed. 2d 140]; *Cupp v. Naughten, supra*, [414 U.S.] at 146 [94 S.Ct. at 400]. No such wrongs occurred here.

Smith v. Phillips, U.S. , , 102 S.Ct. 940, 946, 71 L.Ed. 2d 78 (1982). In performing our jurisprudential function, we have been cautioned by the Supreme Court that the findings of a state court judge are presumptively correct under 28 U.S.C. §2254(d), and the presumption can only be overcome by convincing evidence to the contrary. *Id.* at , 102 S.Ct. at 946; *Summer v. Matter*, 449 U.S. 539, 551, 101 S.Ct. 764, 771, 66 L.Ed. 2d 722 (1981).

Petitioner's constitutional challenge of the decision of the trial judge to deny timely motions for a change of venue involves three discrete arguments. First, excessive and biased pretrial publicity prevented a fair trial; second, substantial community bias required a change of venue; and third, the trial court erred in denying several challenges for cause. Petitioner bears the burden of proving all facts entitling him to discharge, *Brown v. Cuyler, supra*, at 158, and since he has raised the issue of pretrial publicity, federal law requires that Yount's conviction may be overturned only upon a showing that the publicity was so extreme as to cause actual prejudice to a degree rendering a fair trial impossible or that the press coverage has "utterly corrupted" the trial. *Murphy v. Florida*, 421 U.S. 794 at 798, 95 S.Ct. 2031 at 2035, 44 L.Ed. 2d 589 (1974).

A.

The record in the instant case contains two memoranda and one opinion by the trial judge relating to his decision to deny a change of venue. Pretrial publicity is discussed in each. The first was filed on September 21, 1970, prior to selection of the jury. The court found:

> [T]he evidence was limited to the fact that without editorial comment of any kinds the newspapers in the County reported the decision of the Supreme Court of Pennsylvania; but it is to be noted that they not only referred to the dissenting opinion and quoted it, but also to the majority opinion and quoted it. We do not believe that the mandates of the cases extend so far as to say that the news media cannot publicize, without editorial comment, the decisions of our Courts. . . .

Brief of respondents at 20-21. The second memorandum is dated November 14, 1970, after 156 jurors had been interrogated during an 8-day period. The judge found:

> The Court would also note that it has been 4 years since the first trial of this cause, and so far as this Court can recall, there has been little, if any, talk in public concerning the trial from that time to the time when it was announced that a trial date had been fixed. . . .
>
> Nor do we find any unfair inferences or prejudicial effects as to or against the defendant resulting in any of the newspaper items which have been the subject of the affidavit filed in this regard on November 13, 1970. With all of the publicity to which

> they refer, this Court is cognizant that at no time since the commencement of this case on November 4, 1970, have there been any more than 4 spectators in the Court Room, and at most times, 2 of these were 'Court House hangers on.' This is some indication of the fact that particularly in a community as small as ours, there has not been any great effect created by any publicity. . . .

Brief of respondents at 24-25. The final factual finding is found in the post-trial opinion of January 15, 1973.

> The first of the trials occurred in 1966, and is pointed out herein, the second one occurred in 1970. As the record will indicate there was practically no publicity given to this matter through the news media in the meanwhile except to report that a new trial had been granted by the Supreme Court. It is to be noted also that throughout the second trial there was practically no public interest shown in the trial; one thing to be noted is that on some days there being practically no persons present even to listen to it. . . .

The foregoing represent findings by a state court judge that are presumptively correct under the teachings of *Summer, supra.* The pretrial publicity in Clearfield County prior to trial was found to be balanced and accurate, and we cannot conclude from our independent review of the record that there is convincing evidence to the contrary.

The journalistic reports that Yount was to be retried for the crimes for which he was indicted were not inflammatory so as to preclude a fair trial. To accept petitioner's

argument would require a change of venue in all prominent criminal cases that are retried merely because they are reported by the press. There is no constitutional precedent for such an assertion. The news reports concerning the exhaustion of various jury panels and the progress of voir dire are to the same effect. Finally, we find the record barren of evidence to support petitioner's contention that the journalists of Clearfield County intentionally failed to report the good faith decision of the prosecutor to dismiss the rape charge prior to trial. The decision to dismiss was based on a lack of admissible evidence at the second trial and we find that the press accurately reported the status of the case when the information became public knowledge. See, Exs. P 1-11, mm, ss, tt, uu, vv and yy.

Most importantly there is no evidence of record of official misconduct either in dismissing the rape charge prior to trial, or in influencing the publicity given the case as in *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed. 2d 663 (1963) or *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600 (1966). Nor does the pretrial publicity reveal the viciousness evidenced in *Rideau*, *Sheppard* or *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed. 2d 751 (1961). Finally, the publicity in quantity does not approach the mischief detected in *Sheppard*. We are presented, at best, with substantial knowledge in a County of 78,000 citizens that a new trial had been granted in a case involving a significant crime. We find that petitioner has failed in his burden of establishing publicity so extreme as to cause actual prejudice rendering a fair trial impossible in Clearfield County, or that the coverage utterly corrupted the judicial process. *Martin v. Warden*, 653 F.2d 799, 805 (3d Cir. 1981).

B.

Yount next contends that the trial court's decision to deny a change of venue in the face of alleged substantial community bias prevented the selection of an impartial jury and thus denied him a fair trial in contravention of the Sixth and Fourteenth Amendments. Citing statistics that support a finding of general knowledge of the pending cause, Brief of petitioner at 7-8, 26-27, and that many of the prospective jurors expressed fixed opinions as to guilt, Brief of petitioner at 27, Yount would have us hold that the trial judge committed error of constitutional magnitude when he denied a change of venue. We disagree. The extensive latitude granted by the trial judge during voir dire, as well as the responses of the twelve jurors who were sworn to try this case satisfy the constitutional standard of due process under the Fourteenth Amendment.

Again we must look to the factual findings of the trial court. In its opinion denying post-trial motions, the court found:

> The mere fact that it took such a long time to select a jury was simply that defendant raised so many questions and the Court exercised its discretion to assure that there could be no complaint about the final jury empanelled. Certainly because it takes a lengthy time to select a jury is not a sufficient basis for declaring that there is any prejudice or bias whatever involved. In fact, as already indicated this Court perceived no bias or prejudice resulting in any manner.

Brief of respondents at 28. The court also made reference to this contention in its second memorandum dated November 14, 1970, after 121 jurors had been excused for cause. Twelve jurors had been seated. The court observed:

> It is to be considered also that fair trial is not precluded in this case; when one recognizes that almost all, if not all, jurors already seated had no prior or present fixed opinion, and this was established by a very searching examination and cross-examination by counsel for defendant.

This ambiguous statement by the trial court and our duty of independent review requires us to examine the voir dire proceedings to determine whether there is evidence of community passion so pervasive that the accused was denied a fair trial before a "panel of impartial, indifferent jurors." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed. 2d 751 (1961). We find there is none.

Jurors Blair Hoover, Clair Clapsaddle, John Yorke, Mary Jane Waple, Martin Karetski, Julia C. Hummell, Mrs. Jessie M. Parks, Albert I. Undercoffer, and Robert P. Murphy were seated without challenge or objection from Yount. Thus a strong argument can be made that petitioner has failed to preserve any argument with respect to these jurors, since he was represented throughout the trial by able, experienced and prominent counsel. More importantly, however, these jurors expressed no fixed opinion concerning guilt. Jurors Irene Kurtz, John T. Harchak and James J. Hrin were challenged for cause but Kurtz and Harchak indicated that they harbored no fixed opinion,

and Hrin stated that, although he had an opinion, he would keep an open mind and would base his decision on the evidence presented at trial.

Yount continues to urge that these jurors maintained a fixed opinion concerning his guilt following lengthy interrogation. But our reading of the record is to the contrary. It is true, of course, that several jurors expressed an opinion on the ultimate issue at the outset. But this does not disqualify a citizen from participation in the judicial process if the juror is able to set aside any preconceived notion and render a verdict based on the evidence presented in court. *Martin v. Warden*, 653 F.2d 799, 806 (3d Cir. 1981); *United States v. Provenzano*, 620 F.2d 985, 995 (3d Cir. 1980), *cert. denied*, 449 U.S. 899, 101 S.Ct. 267, 66 L.Ed. 2d 129 (1980).

Due to petitioner's allegation that community bias prevented the selection of a fair and impartial jury, we will review the critical responses of each juror during voir dire.

JUROR NO. 1—*Blair Hoover*

Q. Do you have any kind of fixed opinion as to his guilt or innocence?

A. On this question I would have to hear both sides—the facts—before I feel that I could express a true opinion.

Q. The question was, Mr. Hoover, whether or not you have an opinion now, at this time?

A. No.

Q. No opinion at all?

A. No.

* * * * * *

Q. And back at the time you heard these things and read these things, did you have an opinion?

A. Let's see. I would say that you'd come to some opinion, as far as just opinion on what you heard or what you may have read, but to me, as the way I've seen things in papers, in many papers, not to discredit any one paper, this don't say this is fact. So as far as forming a true opinion, I couldn't just do it by what I read. You'd read one thing and then another and somebody else would say something else. There was a lot of different opinions and I heard opinions both ways on it, in many different ways. Does that answer your question?

Q. It makes me think of a couple more.

A. Let me say this. If this would help you any, as I say, I heard as far as hearing—it wasn't one sided. I heard both ways so until you would know the true facts you couldn't—no one could come to a true opinion.

Transcript at 64-65.

* * * * * *

Q. Notwithstanding what you have read and heard concerning Mr. Yount, you are able to presume Mr. Yount innocent of any offense at this time?

A. Well, I feel any man or woman is innocent until proven guilty.

Q. My question is, do you feel that way concerning Mr. Yount at this time?

A. That would cover Mr. Yount too. I said any man or woman.

Q. You definitely have that feeling about Mr. at this time—that he is innocent?

A. He would have to be innocent until proven guilty.

Transcript at 69

JUROR NO. 2—*Clair Clapsaddle*

Q. You have formed some opinion?

A. Well, yes.

Q. Now, is that opinion rather firm and fixed in your mind?

A. Well, I couldn't say it would be, no.

Q. Are you aware of a principle of law we have in Pennsylvania that says an individual who is accused of a crime is presumed innocent until proven guilty—are you aware of that?

A. Yes sir.

Q. Would your present opinion be such that you could accept that general rule that Mr. Yount is presently presumed innocent until proven guilty?

A. That's the way it's supposed to be and.

Q. Assuming it is supposed to be one way—my question is, will you accept it?

A. Yes.

Q. Would you?

A. Yes.

Transcript at 206-207.

* * * * * *

Q. Is there anything you know of at this time which would influence your judgment in this case if you were a juror other than the evidence which would come forth in this case at this time?

A. No.

Q. Mr. Clapsaddle, at one point you did indicate you had had some opinion?

A. Yes.

Q. Are you able to erase that opinion from your mind now and afford the defendant the presumption of innocence?

A. Yes I could, yes.

Q. Having been informed again, let me just say this once more—having been informed now that the defendant is entitled to this presumption of innocence that I mentioned to you, have you erased your opinion and are you now affording the defendant that presumption?

A. That he is innocent?

Q. Yes, until proven guilty?

A. Yes.

Transcript at 210-211.

JUROR NO. 3—*John Yorke*

Q. Mr. Yorke, do you know of the matter involving Jon Young?

A. No.

Q. Have you read anything about Mr. Yount?

A. No.

Q. You don't know anything about the reason why you're here—or why you were called to come here as a prospective juror?

A. No I don't know.

Q. Have you read anything in the newspaper about it?

A. No.

Q. Have you heard any discussions or heard any radio broadcasts about it?

A. No.

Transcript at 370.

* * * * * *

Q. Mr. Yorke, do you have any opinion as to this case that we're talking about. Do you know what case we're talking about now?

A. Yes, it's a Mr. Yon you say.

Q. Jon E. Yount?

A. Yes, Jon Yount.

Q. Do you have any reason—strike that—do you have any opinion as to his guilt or innocence?

A. No I have no opinion.

Q. You have no opinion at all?

A. No.

Transcript at 376.

JUROR NO. 4—*Mary Jane Waple*

Q. Do you Mrs. Waple, presently at this time, have an opinion about Mr. Yount's guilt or innocence?

A. No.

Q. You don't have any opinion at all?

A. I don't know anything about the man or about this case, only what I have read years ago and hardly remember that.

Q. Well you do remember something based upon what you read and heard several years ago—is that true?

A. Yes.

Q. Does that cause you to have an opinion at this time about him—without telling what your opinion is?

A. I don't have an opinion.

Q. You don't have any opinion?

A. No, I just don't know.

Q. You don't know what?

A. I don't know if he's innocent or guilty.

Q. I'm not asking you that.

A. I don't have an opinion. I'm not judging him.

Transcript at 412.

JUROR NO. 5—*James F. Hrin*

Q. Let me ask—if you were to be selected as a juror in this case and take the jury box, could you erase or remove the opinion you now hold and render a verdict based solely on the evidence and law produced at this trial?

A. It is very possible. I wouldn't say for sure.

Q. Do you think you could?

A. I think I possibly could.

Q. Then the opinion you hold is not necessarily a fixed and immobile opinion?

A. I would say not, because I work at a job where I have to change my mind constantly.

Q. Can you enter the jury box with an open mind prepared to find your verdict on the evidence as presented at trial and the law presented by the Judge?

A. That I could do.

* * * * * *

Q. Did I understand Mr. Hrin you would require some—you would require evidence or something before you could change your opinion you now have?

A. Definitely. If the facts show a difference from what I had originally—had been led to believe, I would definitely change my mind.

Q. But until you're shown those facts, you would not change your mind—is that your position?

A. Well—I have nothing else to go on.

Q. I understand. Then the answer is yes—you would not change your mind until you were presented facts?

A. Right, but I would enter it with an open mind.

Transcript at 441-442.

JUROR NO. 6—*Martin Karetski*

Q. Do you have an opinion today as to his guilt or innocence?

A. It's been a long time ago and I'm not too sure now. It was in the paper he plead not guilty.

Q. What you just read the other day—

A. I think about Tuesday or Wednesday's paper.

Q. So based upon what you read about it a long time ago as well as what you read about it within the last few days, do you have an opinion as to his guilt or innocence?

A. Honestly, I couldn't say now.

Q. Are you saying you don't have an opinion or don't know if you have an opinion?

A. I probably don't know if I have an opinion.

Q. Let me ask you this then. In case you do have an opinion, could you wipe it out of your mind —erase it out of your mind before you would take a seat in the jury box and hear whatever evidence you might hear?

A. As it is right now I have no opinion now— four or five years ago I probably did but right now I don't.

Transcript at 561-562.

JUROR NO. 7—*Julia C. Hummel*

Q. Then you do have an opinion regardless of what it was based on—do you have an opinion right now?

A. I really don't know what to say. I don't know what would be the truth, whether to say yes or no.

Q. You mean you can't tell which would be the truth and which would not be the truth?

A. I can't say that he was guilty or that he wasn't.

Q. I'm not asking you that. I'm asking whether or not you have an opinion as to which it is, without telling me which opinion you have. Do you have an opinion as of right now?

A. No.

Transcript at 792-793.

JUROR NO. 8—*Mrs. Jessie M. Parks*

Q. During the process of thinking about it and before you went through the process of thinking less

and less about it, did you form any opinion as to the guilt or innocence of Mr. Yount?

A. Well, truthfully I can say this. I felt this way about it. You know they say there's two sides to every story. Like they say, our Courts are here until the man is proved guilty or innocent and I felt this way—and in a lot of ways it didn't jibe with me and in a lot of ways it did. I can't say he's guilty or I can't say he isn't guilty and that's what my opinion is. I'm not saying yes or no. But I felt that I wouldn't want to be on the jury but then I felt—if it was my duty and I would be called I would do the best of my ability but here is Judge Cherry this morning—his summation of it. I can't exactly say in his words—either you have to prove whether he is guilty or whether he isn't. If you can remember what you said when you talked—I'm sorry—what I mean—you can say well he is, but when you get to thinking can you truly say until you actually know. When the trial was on I didn't read any of it and I didn't get up the assumption to say he's guilty and I can't say he isn't guilty. It's just the same thing and—but so—that's the way I feel about it. Now as far as my opinion which you want, well, I would definitely have to hear it before I could say one way or other. If I'm selected that's okay and if you don't think I'm qualified that's okay too.

Transcript at 814.

JUROR NO. 9—*Albert I. Undercoffer*

Q. Well, taking all of these factors into consideration as you have Mr. Undercoffer, would you

give it a little bit of thought now and tell me whether or not you have an opinion as of right now, just based upon what you know and have heard and thought about. Do you have an opinion as of right now as to his guilt or innocence?

A. No. I think I would have to hear the testimony of both sides and I think I would form my opinion after I hear the testimony of both sides.

* * * * * *

A. It's a little bit like the Court, if somebody makes a statement in Court, the Judge would say, strike that from the record. The jury would be supposed to forget about that. It would be a very difficult thing to do.

Q. It sure is. We have been trying to battle that one for years.

A. I believe for myself—I believe that I could. I would be capable of rendering a fair decision on what I had heard here. I have faith enough in myself.

Transcript at 857-858.

JUROR NO. 10—*Robert P. Murphy*

Q. Have you formed an opinion as to the guilt or innocence of this defendant?

A. No I have not.

Q. May I assume then Mr. Murphy, if you were selected as a juror you could go into the jury box and base your verdict solely on the testimony and evidence along with the instructions that the Judge would give you?

A. That's true.

Q. And that you would carry no opinion with you into the jury box?

A. No.

Transcript at 922.

JUROR NO. 11—*Irene Kurtz*

Q. Have you formed an opinion as to the innocence or guilt of this defendant?

A. No.

Q. If you were selected to sit as a juror, would you be able to base your verdict solely—only on the testimony and evidence you would have and the instructions the Judge would give you?

A. Yes.

Q. And that no prior information or idea you may have would enter into your deliberation?

A. No.

Transcript at 988.

JUROR NO. 12—*John T. Harchak*

Q. Have you formed an opinion as to the guilt or innocence of this defendant?

A. No I haven't.

Q. Mr. Harchak, if you were selected as a juror in this case, would you be able to enter the jury box and base your verdict of guilty or innocent only on the evidence and testimony that you would hear along with the instructions that the Judge would give you?

A. Yes.

Q. And you would have no other influencing factors in arriving at your verdict?

A. No, other than the testimony I would hear in this Court Room.

Transcript at 1119.

These responses not only meet the test of *Murphy* and *Martin* but refute petitioner's assertion that he failed to obtain a fair and "indifferent" jury in Clearfeld County. Moreover, his assertion of substantial community bias and presumptive prejudice is belied by the record. The state court initially summoned seventy-three prospective jurors. The trial judge excused fifty-six for cause and Yount exercised nine peremptory challenges. The Commonwealth exercised one peremptory challenge and four jurors were seated, after one seated juror was excused due to a death of a family member. These percentages are not remarkable to anyone familiar with the difficulty in selecting a homicide jury in Pennsylvania[1] and we find neither an abuse of discretion nor a constitutional violation when the trial judge determined to summon additional jurors while denying Yount's motions to change venue.

The trial court and counsel interrogated an additional sixty-eight citizens, or one hundred forty-one in total, before a jury was selected. Twenty-three peremptory challenges had been exercised. Extensive latitude was granted during voir dire to ascertain the "Mental attitude of appropriate indifference." *Irvin v. Dowd*, 366 U.S. at 724-

[1] As was done here, Pennsylvania law requires individual voir dire beyond the presence of other jurors; under oath; recorded; and with the participation of the court and counsel. Pa.R.Crim.P. 1160.

25, 81 S.Ct. at 1643-1644, and we find nothing in the pretrial publicity, or the responses of the citizens who were excused for cause, or the number of such recusals, or the attitudes of the jurors who were seated, that leads to the conclusion that the venire was presumptively prejudiced so as to require a change of venue. We hold that petitioner has failed to sustain his burden of proving that the trial court committed constitutional error when it denied the motions to change venue. Petitioner has failed to establish that community bias prevented the selection of an impartial jury in Clearfield County in contravention of the Fourteenth Amendment.

C.

Petitioner's final argument relates to the trial court's decision to deny certain challenges for cause thereby requiring the accused to exercise peremptory challenges. We find no constitutional infirmity in this regard.

Irene Kurtz and John T. Harchak were seated as jurors after Yount had exhausted his discretionary challenges. But as we have noted, a challenge for cause with respect to both jurors was not constitutionally required. Kurtz stated that she maintained no opinion as to guilt, and further that she was able to decide the case solely upon the evidence presented. Transcript at 988. The testimony of Harchak is to the same effect. Transcript at 1119. The decision of the trial judge was a discretionary function and did not implicate the Fourteenth Amendment.

Petitioner also urges that a challenge for cause was constitutionally required with regard to potential jurors Marcia Polkinghorn, James F. Decker, Marie E. Richard-

son and Ruth I. Hudson. None of these persons were seated as jurors but Yount claims that he was required to utilize discretionary challenges due to the trial court's erroneous rulings.

Marcia Polkinghorn testified that she had an opinion of guilt following publication of the prior adjudication. Transcript at 755-56. Further that she would "try" to defer her opinion in deference to the law and facts presented in court. Transcript at 764. James Decker indicated that he was of the mind that Jon Yount was guilty. Transcript at 898, 900. But he also testified that he would "try the case solely on the evidence and law." Transcript at 901. Marie Richardson observed that she had no opinion as to guilt, Transcript at 957, but she preferred not to serve due to anxiety as well as a recent death in the family. Transcript at 964. Finally, Ruth Hudson responded that she had a fixed opinion of guilt, Transcript at 1113, but she also testified that she was willing and able to set aside her opinion and base a verdict solely upon the evidence. Transcript at 1113-1114. Yount's challenges for cause were denied in each instance.

None of these citizens sat in judgment of the facts because the accused exercised one of the twenty peremptory challenges provided by Pennsylvania law. In addition, no authority is required for the precept that the grant or denial of a challenge for cause is a discretionary function of the trial judge. Only when an accused is denied a fair and impartial tribunal is the Fourteenth Amendment implicated. We find no such violation here.

The decision of the judge to deny a cause challenge to Marie Richardson was proper. Physical capacity to

serve is a judicial decision and not one to be left to the judgment of an individual juror. The trial judge found that Richardson was capable of serving on a sequestered jury and we perceive no constitutional error in that ruling.

The denial of petitioner's challenges for cause as to Polkinghorn, Decker and Hudson did not violate the Fourteenth Amendment even if we may disagree with those rulings. First, the trial judge granted challenges for cause prior to and following the interrogation of these prospective jurors. *See* Transcript at 1161. Second, Yount retained additional peremptory challenges following the no cause rulings concerning all three prospective jurors. Third, petitioner exercised a peremptory challenge to Margaret Rokosky, Transcript at 1138, after he exercised a similar challenge as to Ruth Hudson. And fourth, the jurors and alternates who were seated after petitioner had exhausted his peremptory challenges met the test of *Murphy v. Florida*, 421 U.S. 794, 199-803, 95 S.Ct. 2031, 2035-2037, 44 L.Ed. 2d 652 (1974) and *Martin v. Warden*, 653 F.2d 799 (3d Cir. 1981). We hold that petitioner has failed to sustain his burden of proving the substantive elements of his claim.

In sum, we hold the petitioner, Jon Yount, has failed to establish that: (1) excessive and biased pretrial publicity prevented a fair trial; (2) substantial and undue community bias required a change of venue; and (3) the trial court erred when it denied several challenges for cause. Petitioner's exhausted state claims assail, in part, the factual findings of an experienced trial judge and an appellate jurist of renown. We find an absence of convincing evidence to contradict their findings and we fur-

ther hold, based on an independent review of the record, that petitioner has failed to establish that this state court judgment is violative of the Due Process Clause of the Fourteenth Amendment.

A written order will follow denying the petition for habeas relief with prejudice.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 81-234

JON E. YOUNT,

Petitioner,

vs.

EARNEST S. PATTON, Superintendent, SCI – Camp Hill, and HARVEY BARTLE III, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

ORDER OF COURT

AND NOW, this 22nd day of April, 1982,

IN IS ORDERED that the petition of Jon E. Yount for writ of habeas corpus be and hereby is denied with prejudice.

(s) Donald E. Ziegler
Donald E. Ziegler
United States District Judge

ORDER OF COURT
[Caption Omitted]

AND NOW, this 23rd day of April, 1982, it appearing that the issues presented are not frivolous,

IT IS ORDERED that a certificate of probable cause be and hereby is granted.

(s) Donald E. Ziegler
Donald E. Ziegler
United States District Judge

MOTION TO SUPPLEMENT THE RECORD
[Caption Omitted]

AND NOW comes the Petitioner, Jon E. Yount, by his attorney, George E. Schumacher, Federal Public Defender, and moves this Honorable Court to supplement the record with additional exhibits and as grounds therefor sets forth as follows:

1. A hearing was conducted before this Court on March 31, 1982 on the above case.

2. Prior and subsequent to the date of the hearing a number of newspaper articles appeared in newspapers of general circulation, especially in the Clearfield area and more particularly, The Courier Express. Copies of those articles are attached hereto as exhibits and made a part hereof by reference.

3. On May 12, 1982, a conference was held between the Federal Public Defender and the Petitioner at which time Yount called to the attention of his counsel those newspaper articles as well as additional newspaper articles encouraging readers to write to this Court concerning the prior recommendation of Magistrate Robert C. Mitchell recommending that he be granted a new trial.

4. Counsel is unaware of whether or not the Court has received any responses to the newspaper articles and as directed by his client, respectfully requests that an Order be entered that the attached newspaper articles, as well as any letters received by

the Court concerning this case, be filed of record for whatever purpose may be appropriate in the further appeal of this case.

Respectfully submitted,
(s) George E. Schumacher
George E. Schumacher
Federal Public Defender
Attorney for Petitioner
Jon E. Yount

COURIER EXPRESS 12/8/81

JUDGES REILLY AND CHERRY INCLUDED

PROSECUTORS WILL TESTIFY AGAINST PETITION BY YOUNT

CLEARFIELD – Clearfield County's prosecutors will be in Pittsburgh Dec. 28 to present additional testimony in an effort to keep Jon Yount, formerly of DuBois, in prison where he is serving a life term for murder.

Accompanying them will be Clearfield County President Judge John K. Reilly Jr., former district attorney and Yount's prosecutor, and Senior Judge John A. Cherry, who presided at the 1966 and 1970 trials in which Yount was convicted of slaying his high school math student, Pamela Sue Rimer of Luthersburg.

The jurists will testify about the trials and the atmosphere surrounding them, the prosecutors said. Their appearance in U.S. District Court will be

another chapter in the county's opposition to Yount's petition for release.

The prosecutors will also take former sheriff William Charney of Houtzdale, a juror and media representatives, said District Attorney Thomas F. Morgan.

Yount, in his petition for habeas corpus filed in the federal district court, alleges prejudicial media accounts prevented him from receiving a fair trial.

At a Nov. 3 hearing in Pittsburgh, Homer King, of Pittsburgh, Yount's defense counsel, testified he stayed at the Dimeling Hotel in Clearfield during the trials and had to fight his way across the street to the courthouse "because of the thousands of people standing outside in the courthouse square," said Assistant District Attorney F. Cortz Bell III.

Mr. Yount's mother, Carolyn, also testified about news reports heard on the radio and the spectators at the trials. The courtroom was packed every day during the first, trial, she stated, and although less, the courtroom was crowded for the second trial, in 1970.

Yount also testified about the trials and Constance Ives, a daughter-in-law of one of the jurors, testified concerning jury selection.

Because of the testimony, District Attorney Morgan requested a continuation of the hearing to have additional testimony placed on the record, he said.

After testimony is completed, both sides will file written briefs, according to Mr. Bell.

Yount in his petition is claiming he was convicted unconstitutionally of the murder a second time because:

– He was not tried by an impartial jury.

– He was not allowed a change of venue from Clearfield County.

– The prosecutor used statements he gave police without prior notice of his constitutional rights.

– His defense counsel was incompetent.

Clearfield County prosecutors said it will take months for Federal Magistrate Robert C. Mitchell to make his recommendation to the court. If the petition is granted, Mitchell will recommend Yount be retried within a certain number of days, Bell said.

If the district court agrees, Mr. Bell said, the district attorney will appeal.

Yount was convicted in 1966 of

Please Turn to Page 2, Col. 3

PROSECUTORS...

(Continued from Page One)

first degree murder and rape in the stabbing death of the 18-year-old math student. In 1970, the rape charge was dropped, but the murder conviction was upheld.

Since his convictions, Yount has appealed eight times to the state board of pardons for release from prison and has been turned down each time. He is currently confined to the state correctional facility at Camp Hill.

THE COURIER EXPRESS – DECEMBER 29, 1981

YOUNT'S PLEA FOR FREEDOM DECISION DUE BY FEBRUARY

PITTSBURGH (UPI) – A former Clearfield County school teacher serving a life sentence for the 1966 murder of a female student has asked U.S. Magistrate Robert C. Mitchell to free him from prison.

Jon E. Yount, 43, twice convicted of the slashing murder of 18-year-old Pamela Sue Rimer, claimed he has been unlawfully imprisoned for 15 years because he was not afforded a fair and impartial jury.

Yount also said he should be released because state police did not inform him of his rights against self-incrimination before he gave them an oral statement in which he admitted attacking Miss Rimer, a student at DuBois Area High School where he taught.

Yount also claimed Clearfield Common Pleas Judge John A. Cherry prejudiced the jury by giving erroneous instructions before allowing the panel to begin its deliberations.

Francis V. Sabino, counsel for Yount, Cherry and John K. Reilly, former Clearfield County district attorney and case prosecutor, presented testimony before Mitchell, who took the matter under advisement. He indicated he would issue a ruling by mid-February.

Any decision by Mitchell will be reviewed by U.S. District Judge Donald E. Ziegler.

Yount's seventh bid for parole was denied last year by the state Board of Pardons after Lavonne Rimer, the victim's mother, testified she would not feel safe if Yount were released. The Clearfield Coun-

ty district attorney's office also opposed a commutation of Yount's sentence.

Yount was initially convicted in April 1966 of first degree murder and rape. The state Supreme Court granted a retrial after Yount's attorney claimed Yount had not been informed of his right to free counsel before his first trial.

A second jury deliberated only 90 minutes before convicting Yount.

A-12 PITTSBURGH PRESS, THURS., FEB. 18, 1982

RETRIAL URGED FOR TEACHER IN SLAY CASE

By MARY STOLBERG

An ex-Clearfield County teacher who was convicted of murdering and raping his female student has won another legal victory in his fight for freedom.

A federal magistrate has recommended that Jon Yount either be released from prison or tried again in a different place for the 1966 slaying of Pamela Sue Rimer.

In requesting the new trial, Magistrate Robert Mitchell agreed with Yount, who said his previous trials have been tainted by unfavorable publicity in Clearfield County.

If U.S. District Judge Donald Ziegler approves Mitchell's suggestion, it would be the third trial in the case for Yount, who is serving a life sentence at the state prison at Camp Hill.

Yount was first tried and convicted of rape and murder in the fall of 1966, months after Miss Rimer's body was discovered in a wooded area near her home in Luthersburg.

Much of the evidence at the first trial centered on Yount's confession to state police the day after Miss Rimer's body was discovered. He walked into the state police barracks at DuBois and said "I'm the man you're looking for ... I hit her with a wrench and then I choked her."

After his first conviction Yount argued that his confession should never have been admitted at trial because police failed to tell him about his constitutional rights to remain silent.

He took his case to the state Supreme Court, which agreed with him, overturned the conviction and ordered a new trial. Yount was retried in 1970 in Clearfield County and was found guilty.

Yount said the second trial was prejudiced, like the first had been, with unfavorable and sensational publicity.

Although his confession was not allowed in the second trial, the media kept focusing on it, Young said. In such an atmosphere, the ex-teacher said, it was impossible to select a fair jury. Nevertheless, the judge refused to have the trial moved.

THE COURIER EXPRESS – FEBRUARY 19, 1982

RECOMMENDS NEW TRIAL FOR YOUNT OR RELEASE

PITTSBURGH (UPI) – A federal magistrate has recommended a new trial or possible freedom for a former Clearfield County teacher convicted in the rape-slaying of one of his students in 1966.

U.S. Magistrate Robert Mitchell issued a recommendation that Jon Yount, currently serving a life sentence at the state prison at Camp Hill, either be granted a new trial or be released. Mitchell agreed with Yount that his two previous trials had been tainted by unfavorable publicity in Clearfield County.

The recommendation is being considered by U.S. District Judge Donald Ziegler.

Yount was tried and convicted twice in the death of teenager Pamela Sue Rimer, whose body was discovered in a wooded area near her home in Luthersburg.

After the first conviction, Yount argued his constitutional rights had been violated and his confession was inadmissible since police failed to inform him of his right to remain silent.

The case was appealed to the state Supreme Court which overturned the original conviction and ordered a new trial. Yount was retried in 1970 in Clearfield County and again was convicted.

Yount has since argued the second trial was prejudiced, due to unfavorable and sensational publicity. He said the media kept focusing on his confession,

which was not allowed in the second trial, and selection of a fair and impartial jury was impossible.

THE COURIER EXPRESS – FEBRUARY 22, 1982

DISTRICT ATTORNEY OBJECTING TO YOUNT RECOMMENDATION

CLEARFIELD – The Clearfield County District Attorney's office is at work on objections to be filed in regards to a federal magistrate's recommendation of possible freedom for former DuBois High School math teacher Jon Yount, convicted of slaying one of his students in 1966.

U.S. Magistrate Robert Mitchell last week in Pittsburgh issued a recommendation that Yount, currently serving a life sentence at a state prison in Camp Hill, either be granted a new trial or be released.

Assistant District Attorney F. Cortez Bell III said the Commonwealth has 10 days to file objections to the magistrate's recommendation before the District Court makes its final determination.

The recommendation is being considered by U.S. District Judge Ziegler, who can adopt the magistrate's report, adopt the prosecution's objections, or set up hearings on his own, Mr. Bell stated.

Yount, a DuBois High School math teacher was tried and convicted twice in the death of 18-year-old Pamela Sue Rimer, whose body was discovered in a wooded area near her Luthersburg RD home.

The federal magistrate's recommendation stated that Yount should have been granted a change of

venue, agreeing that Yount's two previous trials had been tainted with unfavorable publicity in Clearfield County.

Yount has argued the second

Please Turn to Page 2, Col. 3

District Attorney...

(Continued from Page One)

trial in 1970 was prejudiced, due to unfavorable and sensational publicity. He alleged the media kept focusing on his confession, which was not allowed in the second trial, and selection of a fair and impartial jury was impossible.

Mr. Morgan said his office is taking exception to that. His office is taking the position that the change of venue wasn't required—that Yount could and did get a fair trial in the county.

If the federal judge finds in favor of Yount, Mr. Bell said, the district attorney will appeal the matter to the Third Circuit Court. Assistant District Attorney Bell was also of the opinion that Yount would appeal any decision not in his favor.

Morgan said he is of the opinion the loser then would ask the U.S. Supreme Court to take a look at it, and the Supreme Court grants about one out of 20 appeals.

He said it will be a fair amount of time before the matter is resolved.

Morgan noted a federal magistrate recommended a new trial for John Bishop of Osceola Mills, convicted

in 1976 of voluntary manslaughter in Clearfield County.

The federal district court agreed, but the decision was overturned by the Third Circuit Court, and the Supreme Court refused to review it.

THE COURIER-EXPRESS 9-22-82 Front Page

YOUNT PETITION ARGUMENT SLATED FOR NEXT WEEK

PITTSBURGH – Argument has been scheduled in Pittsburgh this month on a petition for habeas corpus filed last year by Jon Yount, formerly of DuBois, a twice-convicted murderer.

The argument to be heard by U.S. District Judge Donald Ziegler is scheduled for March 31, according to Clearfield County Assistant District Attorney F. Cortez Bell III.

Judge Ziegler has not accepted the recommendation of District Magistrate Robert Mitchell to free Yount or give him a new trial, Mr. Bell said.

Mr. Yount was convicted of first degree murder in the 1966 rape-slaying of his high school a math student, Pamela Sue Rimer, 18 of Luthersburg. He appealed his conviction and was reconvicted in 1970.

In his current bid for freedom, Mr. Yount claims that sensational pre-trial publicity for the second trial made it impossible for him to have an impartial jury. He said the media kept focusing on his confession, which was not admissible in the second trial.

Mr. Yount should have been given a change of venue, according to Magistrate Mitchell's recommendation.

... given what they deserve and not be let off so easily.

—0—

This is the address of the Judge reviewing the case of Jon Yount: U.S. Dist. Judge Donald Ziegler, U.S. Post Office and Court House, Seventh and Grant St., Pittsburgh Pa., 15222.

Page 4 3-27-82

PEOPLE SPEAK
WHERE IS JUSTICE?

Dear Editor:

Hats off to Josephine Cerny of Coolspring! She cares enough about justice to spend a little time and thought working for it. She opposes any consideration for the release of Jon Yount. So do I.

Most people feel the same way, but most will do little in the way of protest to prevent it. It's easy not to become involved and leave things to the judgments of people like the magistrate (Mitchell) in Pittsburgh. Mitchell thinks Yount should have another trial. We have already had two, and Yount was found guilty both times. Mitchell doesn't care about costs. While important, the cost is the least important of the issue.

Mitchell claims Yount had bad publicity and wasn't treated fairly. What is his reasoning? Are we to

believe that anyone could expect good publicity from the horror story he created?

I attended the first trial of Jon Yount and I'll never forget the agony I witnessed in the face of Pamela Rimer's mother when her murdered daughter's clothing, offered as evidence, was dropped upon the table. The pathologist made his gruesome report. There was unbelievable silence in the courtroom.

This terrible crime happened within sight and safety of her own home.

Must this poor mother, who has suffered so greatly and so undeservedly, be endlessly subjected to another trial? Should she have to face another period of uncertainty while waiting for the decision of a Board of Pardons review? What has happened to justice?

U.S. District Judge Donald Ziegler will render his decision on the recommendation by Mitchell next Wednesday, March 31. You can express your concern by writing to him at the following address: U.S. District Judge Donald Ziegler, U.S. Postoffice & Courthouse, Seventh & Grant St., Pittsburgh Pa.

Pray that his decision will bring the long suffering mother peace.

James G. Meenan,
Punxsutawney

THE COURIER EXPRESS – APRIL 1, 1982

JUDGE HEARS YOUNT CASE ARGUMENTS

PITTSBURGH (UPI) – A federal court judge is considering granting parole or ordering a third trial for a former DuBois High School teacher twice convicted for a 1966 rape-slaying of one of his students.

U.S. District Court Judge Donald Ziegler heard arguments Wednesday by attorneys for Jon Yount and by Clearfield County District Attorney Thomas Morgan, who had filed objections to a District Magistrate's recommendation that Yount be retried or released.

Yount has been seeking release since his first conviction in the slaying of Pamela Sue Rimer, 18, found dead in an area near her home in Luthersburg, Clearfield County, 16 years ago. She was on her way home from school when she was slain, officials said.

Yount appealed his conviction in the case and won a second trial but was convicted a second time in 1970. He argued sensational publicity prior to the second trial hampered his chances for an impartial jury.

Yount filed writ of habeas corpus through U.S. District Magistrate Robert Mitchell.

A spokeswoman for Ziegler gave no indication as to when he might reach a decision.

A-16 PITTSBURGH PRESS, THURS., APRIL 1, 1982

GIRL'S KILLER MAY BE GIVEN THIRD TRIAL

By Mary Stolberg

A federal judge is considering whether to order a third trial for a former Clearfield County teacher who has been convicted twice already for killing a female student in 1966.

During a hearing yesterday, U.S. District Judge Donald Ziegler said he has begun working on Jon Yount's case but didn't know when he would file an opinion.

Yount, 43, who claims both his trials were unfair has waged a lengthy court battle to gain his freedom from the state prison at Camp Hill, where he is serving a life term.

Yount says he has been illegally imprisoned for the 15 years since he was first found guilty of raping and murdering Pamela Sue Rimer, an 18-year-old student in the fall of 1966.

Much of the prosecution's evidence in the first trial surrounded Yount's alleged confession to police the day after the murder.

Yount turned himself in at the police station and allegedly told police "I hit her with a wrench and then I choked her."

Yount argued his confession should never have been admitted at the trial because police didn't tell him about his constitutional right to remain silent.

He took his case to the state Supreme Court, which agreed with him, and overturned the convic-

tion. He was retried in Clearfield County in 1970 and again was found guilty.

He claims the second trial was prejudiced by unfavorable publicity which included repeated references to his confession.

Yount claims he should be either set free or given a new trial because his constitutional rights were violated.

Earlier this year U.S. Magistrate Robert C. Mitchell agreed with him. Mitchell said Yount provided more than enough evidence to show that his second trial was not fair because it was held in the prejudicial atmosphere of Clearfield County.

The magistrate wrote an opinion saying Yount should be let go or retried in a different part of the state where a fair-minded jury could be chosen.

Mitchell submitted his findings to Ziegler who must now decide.

During yesterday's hearing, Yount did not appear. He was represented by attorney George Schumacher, who told Ziegler the trial transcript was replete with evidence of the vindictive atmosphere surrounding Yount's second trial.

Schumacher said it was apparent that people vied to get on the jury so they could "hang the guy (Yount) again."

Shumacher said of the 12 jurors that decided the case, nine said they thought Yount was guilty before the trial began.

But F. Cortez Bell III, an assistant district attorney in Clearfield County said those nine jurors also said they thought they could still decide his case fairly.

Bell also said that although Yount's second trial received publicity, there are only two newspapers in Clearfield County and the jury was sequestered during the four days of trial and deliberations so it couldn't read articles about the case.

THE COURIER EXPRESS – APRIL 23, 1982

YOUNT DENIED THIRD TRIAL

PITTSBURGH (UPI) – A federal judge Thursday denied a third trial for a former Clearfield County teacher twice convicted for the 1966 slaying of a female student.

U.S. District Judge Donald Ziegler ruled there was insufficient evidence to support Jon Yount's claim his two trials were invalidated by adverse publicity and unfair jurors.

Yount, 43 convicted in the bludgeon slaying of Pamela Sue Rimer, has been trying to win freedom through the courts while serving a life sentence at a prison in Camp Hill near Harrisburg.

He appealed his first conviction to the state Supreme Court on grounds a confession he gave police never should have been admitted at his trial because he was not informed of his constitutional right to remain silent. The court agreed and ordered a new trial, which was held in 1970 and which also ended in his conviction.

Ziegler rejected the contention about bad publicity, noting the media in Clearfield County gave "balanced and accurate" coverage of the second trial. The judge also ruled jurors were not biased and were able to drop any preconceived notions on the case.

Ziegler's ruling overturned a proposal by a federal magistrate who considered Yount's case last month.

[Certificate of Service Omitted]

ORDER OF COURT
[Caption Omitted]

AND NOW, to-wit, this 21st day of May, 1982, upon consideration of the within Motion to Supplement the Record, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that those articles appearing in newspapers of general circulation prior and subsequent to the March 31, 1982 hearing be made a part of the record of this case.

IT IS FURTHER ORDERED any and all correspondence received by the Court also be made a part of the record of this case.

(s) Donald E. Ziegler
United States District Judge

ANSWER TO MOTION TO SUPPLEMENT THE RECORD

[Caption Omitted]

NOW, comes the Respondents, by and through F. Cortez Bell, III, Esquire, Assistant District Attorney of Clearfield County, and respectfully sets forth their Answer in regard to Petitioner's Motion to Supplement the Record as follows:

1. Jon E. Yount presented a Petition for Writ of Habeas alleging that his conviction was obtained in violation of his Constitutional right to select and empanel a fair and impartial jury.

2. Following evidentiary hearing and the submission of briefs before Magistrate Robert Mitchell, the Magistrate filed a Report and Recommendation on or about February 12, 1982, whereby it was recommended that the Petition for Writ of Habeas Corpus be granted and that Petitioner be discharged within sixty days unless the Commonwealth retries him.

3. That on April 22, 1982, the Honorable Donald E. Ziegler, United States District Judge, issued an Order and Opinion by which the Petition for Writ of Habeas Corpus was denied with prejudice. On April 23, 1982, Judge Ziegler further issued an Order granting a Certificate of Probable Cause with regard to the Petition.

4. That it is alleged by Petitioner that during the course of hearings and conferences before the

District Court there appeared in newspapers of general circulation within the Clearfield County area various news articles with regard to proceedings in the case. Petitioner by his Motion requests that said newspaper articles and any correspondence received by the Court concerning this case be filed of record for whatever purpose may be appropriate in the further appeal of this case.

5. That Respondents by this Answer would object to the filing of said items, in that the said newspaper articles and correspondence, if any, are irrelevant and immaterial to the issues asserted in the Petition for Writ of Habeas Corpus. Respondents would further aver that the Petition for Writ of Habeas Corpus deals solely with whether the Petitioner's rights were violated at the time of his arrest and during the jury selection before trial. Any newspaper articles appearing in the press at this time have no relevance to Petitioner's claims which are adequately supported by exhibits which have already been introduced at previous hearings before the Magistrate and the Court.

WHEREFORE, it is respectfully requested that the Court issue an Order denying Petitioner's Motion to Supplement the Record on the basis that said items are irrelevant and immaterial to the allegations raised in Petitioner's Petition for Writ of Habeas Corpus.

Respectfully Submitted,
(s) F. Cortez Bell III
F. Cortez Bell, III, Esquire
Assistant District Attorney

[Affidavit and Certificate of Service Omitted]

ORDER OF COURT
[Caption Omitted]

AND NOW, to wit, this 21st day of June, 1982, upon consideration of the Petitioner's Motion to Supplement the Record and the Respondents Answer thereto, it is hereby ORDERED, ADJUDGED AND DECREED that the Petitioner's request that the record in this matter be supplemented by the addition of articles appearing in newspapers of general circulation prior and subsequent to the March 31, 1982 hearing in this matter be and hereby is granted.

(s) Donald E. Ziegler
United States Judge

NOTICE OF APPEAL
[Caption Omitted]

Notice is hereby given that the petitioner, Jon E. Yount, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order of the Hon. Donald E. Ziegler dated April 22, 1982, denying his petition for writ of habeas corpus.

Dated: May 21, 1982

(s) George E. Schumacher
George E. Schumacher
Federal Public Defender
Attorney for Petitioner,
Jon E. Yount.

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 82-5372

JON E. YOUNT, *Appellant*

v.

ERNEST S. PATTON, SUPERINTENDENT, SCI — CAMP HILL, and HARVEY BARTLE III, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, *Appellees*

Appeal From the United States District Court for the Western District of Pennsylvania—Pittsburgh

D.C. Civil No. 81-234

Argued December 17, 1982

Before: HUNTER, GARTH, *Circuit Judges* and STERN,* *District Judge*

*Opinion filed May 10, 1983***

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* Honorable Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

** Due to illness, Judge Garth separately filed his opinion concurring in the judgment on June 10, 1983.

George E. Schumacher (Argued)
Federal Public Defender
590 Centre City Tower
650 Smithfield Street
Pittsburgh, PA 15222
Attorney for Appellant

F. Cortez Bell, III (Argued)
Assistant District Attorney
Thomas F. Morgan
District Attorney
Office of the District Attorney
P.O. Box 887
Clearfield, PA 16830
Attorneys for Appellees

OPINION OF THE COURT

HUNTER, *Circuit Judge:*

1. Petitioner Jon E. Yount was convicted in 1966 of first degree murder and rape in the Court of Oyer and Terminer and General Jail Delivery of Clearfield County, Pennsylvania. On direct appeal the Pennsylvania Supreme Court determined that petitioner had not received adequate warnings against self-incrimination. It reversed the judgment of sentence and granted a new trial. *Commonwealth v. Yount*, 435 Pa. 276, 256 A.2d 464 (1969), *cert. denied*, 397 U.S. 925 (1970) ("*Yount I*"). After a retrial before the same court, petitioner was convicted of first degree murder and was again sentenced to life imprisonment. The Pennsylvania Supreme Court on direct appeal affirmed the judgment of sentence. *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242 (1974) ("*Yount II*").

2. In 1981 petitioner filed a petition for a writ of habeas corpus in United States District Court.[1] Petitioner alleged, *inter alia*, that his conviction had been obtained in violation of his fifth and fourteenth amendment privilege against self-incrimination and his sixth and fourteenth amendment right to a fair trial by an impartial jury.[2] The

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[1] The petition was initially filed in the Middle District of Pennsylvania, but was transferred to the Western District of Pennsylvania pursuant to 28 U.S.C. §2241(d) (1976).

[2] None of petitioner's other allegations are before us. Petitioner does not appeal the district court's rejection of his challenges to the trial court's instructions on the degrees of homicide and on the murder weapon. *See Yount v. Patton*, 537 F. Supp. 873, 875 (W.D. Pa. 1982); app. at 134a. All other claims by petitioner, including his attack on the use of character evidence at trial, his allegation of a prejudicial charge by the court, and his claim of ineffective assistance of counsel, were deleted on petition-

federal magistrate concluded that petitioner's privilege against self-incrimination had not been violated, but recommended that the petition be granted because petitioner had been denied a fair and impartial jury. App. at 124a-41a. The district court agreed on the former issue, rejected the magistrate's recommendation on the latter issue, and denied the petition. *Yount v. Patton,* 537 F. Supp. 873 (W.D. Pa. 1982).

3. We agree with the district court that petitioner's privilege against self-incrimination was not infringed. We conclude, however, that the petitioner's right to trial by a fair and impartial jury was violated. We will therefore remand that portion of the case to the district court.

I. SELF-INCRIMINATION

A. *Facts*[3]

4. During the early evening of April 28, 1966, the body of Pamela Rimer, an 18-year old high school student, was found in a wooded area near her home in Luthersburg, Clearfield County. There were numerous wounds about her head, apparently caused by a blunt instrument. There were also cuts caused by a sharp instrument on her throat and neck. One of her stockings was knotted and tied

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er's motion after the district court determined that the claims had not been presented to the courts of Pennsylvania for their initial consideration. *See* 537 F. Supp. at 874-75; *see* app. at 126a-27a, 154a.

[3] The federal magistrate adopted the statement of the facts given in the opinion of the Pennsylvania Supreme Court in *Yount II,* 455 Pa. at 306-08, 314 A.2d at 244-45. App. at 128a. We too adopt that statement. In addition we on occasion cite directly to the record for certain details omitted in the supreme court's summary. Unless otherwise noted, those details are undisputed.

around her neck. An autopsy showed that she had died of strangulation when blood from the throat and neck wounds was drawn into the lungs. Except for her stocking and shoe she remained fully clothed. The autopsy revealed no indication that she had been sexually assaulted.

5. Neighbors gave state police a description of a station wagon which they had seen at approximately the time and place at which the body was found. *E.g.*, Testimony of trial beginning November 17, 1970, at 143-48 ("T.T."). Sometime after two o'clock on the morning of April 29, 1966, state policemen learned that petitioner, the victim's high school mathematics teacher, had on prior occasions been seen in a station wagon fitting that description. T.T. at 290-93; Transcript of Proceedings—August 17, 1970, at 17-18, 20-21 ("T.P.").

6. At approximately 5:45 that morning, petitioner voluntarily appeared at the State Police Substation in DuBois, Clearfield County. The occupants of the substation had participated in the investigation of the Rimer homicide, T.T. at 198-201, 203-05, 255-56, but had gone to sleep unaware of any link between the homicide and petitioner or his vehicle. T.T. at 275, 277; T.P. at 13, 20.[4]

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[4] Petitioner asserts that before he came to the substation, the state policemen there knew that he and his vehicle had been linked to the scene of the crime. Appellant's Brief at 33. The trial court found, however, that when petitioner appeared at the substation "there was no knowledge on the part of the Police [at the substation] that he 'was the one they were looking for.'" App. at 754a. The Pennsylvania Supreme Court stated that the state policemen who had discovered that petitioner's automobile fit the neighbors' description had been working entirely separately and in a different location. *Yount II*, 455 Pa. at 309-10, 314, 314 A.2d at 246, 248.

Petitioner rang the doorbell. A trooper awoke, opened the door and asked whether he could be of assistance. Petitioner stated, "I am the man you are looking for." The trooper asked petitioner to repeat what he had said, app. at 11a; T.T. at 250-51, and then asked whether petitioner was referring to "the incident in Luthersburg." Petitioner said yes. The trooper then asked petitioner to come in and be seated.

7. Leaving petitioner unattended, the trooper went to a back bedroom and roused a detective and a second trooper. The first trooper informed them that "there was a man in the front that said we are looking for him" in connection with the Luthersburg incident. *See* T.T. at 276; T.P. at 6. The first trooper then returned to the front office where petitioner had removed his coat, hat and gloves. The trooper asked petitioner for his identification. Petitioner gave the trooper his wallet, which the trooper returned after removing petitioner's automobile operator's license. T.T. at 252.

8. Shortly thereafter, the detective and the second trooper entered the front office. The detective was handed petitioner's license and learned that petitioner was Jon Yount. App. at 12a; T.T. at 259, 262-63, 271. The detective requested that petitioner be seated inside a smaller adjacent office, and gave petitioner something to eat. *See Yount I*, 435 Pa. at 278, 256 A.2d at 465; T.P. at 15. The detective asked, "Why are we looking for you?" Petitioner replied, "I killed that girl." Upon hearing that answer, the detective inquired, "What girl?", and petitioner responded, "Pamela Rimer."

9. The detective then asked, "How did you kill this girl?" Petitioner answered, "I struck her with a wrench

and I choked her." At that time the detective undertook to advise petitioner of his rights. The detective, however, failed to tell petitioner of his right to court-appointed counsel if he could not afford his own attorney. The detective then conducted an interrogation regarding the details of the crime. At some point the second trooper searched petitioner and confiscated his penknife. T.T. at 265-66, 267-68, 272-73.[5] Petitioner gave his first written confession to the detective. Later the district attorney, after giving similarly inadequate warnings, questioned petitioner and obtained another written confession.

B. *State Proceedings and Proceedings Below*

10. Before the first trial petitioner moved to suppress his statements and confessions as violative of *Miranda v. Arizona*, 384 U.S. 436 (1966). After a hearing the motion was denied. The petitioner's statements and confessions were admitted in the first trial over petitioner's objections.

11. The Pennsylvania Supreme Court held that the warnings given by the detective and district attorney were inadequate under *Miranda*. *Yount I*, 435 Pa. at 279, 256 A.2d at 465 (Roberts, J., plurality opinion). The court rejected the Commonwealth's argument that the confessions were volunteered. "After indicating a willingness to talk, [petitioner] was *interrogated* about details of the

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[5] Petitioner argues that the state police searched him and confiscated his penknife *before* the detective asked, "Why are we looking for you?" Appellant's Brief at 32. Although there have been no explicit factual findings as to when the search occurred, petitioner's assertion has been implicitly rejected in the factual findings and holding of the state trial court and the district court, and is not fairly supported by the record.

crime, and his formal confession followed." 435 Pa. at 279-80, 256 A.2d at 465 (emphasis in original); *see* 435 Pa. at 281, 256 A.2d at 468 (Jones, C.J., concurring). The court found the confessions invalid and granted a new trial. 435 Pa. at 281, 256 A.2d at 466.

12. Prior to the second trial petitioner requested that his oral and written statements be suppressed. The trial court on the authority of *Yount I* suppressed the written confessions, as well as the question "How did you kill this girl?" and its answer. The trial court ruled, however, that petitioner's statement "I killed that girl" and his identification of "that girl" as "Pamela Rimer" were admissible under *Yount I*. App. at 748a, 755a. It concluded that petitioner's statements were made before petitioner was in custody. App. at 755a.

13. On appeal the Pennsylvania Supreme Court did not determine whether petitioner was in "custody" when he made the statements to the detective. *Yount II*, 455 Pa. at 311 n.4, 314 A.2d at 247 n.4. Instead it ruled that the statements were volunteered and not the product of interrogation. The court said that the detective's first question, "Why are we looking for you?", was simply an extemporaneous response "of neutral character." 455 Pa. at 310, 314 A.2d at 246. In the court's view the detective's question "What girl?" after petitioner had responded, "I killed that girl," was merely "a clarifying inquiry." *Id.* The supreme court therefore concluded that the questions were not calculated, expected or likely to elicit an incriminating response. 455 Pa. at 309, 314 A.2d at 246.

14. In his petition for a writ of habeas corpus, petitioner again argued that his fifth and fourteenth amendment privilege against self-incrimination had been violated

by the admission of his responses to the detective's questions. The magistrate ruled that the responses were properly admitted because only after those responses, when "the police recognized that petitioner was present to confess his participation in a crime, did his presence become custodial." App. at 132a. The magistrate did not consider whether the questions constituted interrogation. The district court adopted the magistrate's findings. 537 F. Supp. at 875.

C. *Discussion*

15. *Miranda* held that unless the government has advised a defendant of his rights, it cannot put into evidence statements stemming from the "custodial interrogation" of the defendant. 384 U.S. at 444. The Supreme Court defined "custodial interrogation" to mean

> questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

Id. (note omitted).

16. Petitioner argues on appeal that his statements "I killed that girl" and "Pamela Rimer" must be excluded as the products of custodial interrogation. He contends that the detective's questions constituted "interrogation," and asserts that the state policemen would not have allowed him to leave the substation when the questions were posed. We need not consider whether the questions "Why are we looking for you?" and "What girl?" constituted interrogation under *Miranda* because we conclude that petitioner was not in "custody" until after he had answered those questions. *See Beckwith v. United States*, 425 U.S.

341, 345-46 (1976); *United States v. Mesa*, 638 F.2d 582, 588 (3d Cir. 1980) (opinion of Seitz, C.J.).

17. To determine whether an individual is in custody, we use the "objective test of whether the 'government has in some meaningful way imposed restraints on [a person's] freedom of action.'" *Steigler v. Anderson*, 496 F.2d 793, 798 (3d Cir. (quoting *United States v. Jaskiewicz*, 433 F.2d 415, 419 (3d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971)), *cert. denied*, 419 U.S. 1002 (1974). Where, as here, the individual has not been openly arrested when the statements are made,

> something must be said or done by the authorities, either in their manner of approach or in the tone or extent of their questioning, which indicates that they would not have heeded a request to depart.

Id. at 799 (quoting *United States v. Hall*, 421 F.2d 540, 545 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970)); accord *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam); *see Mesa*, 638 F.2d at 587 n.4 (opinion of Seitz, C.J.). When the questioning occurs in a police station we must scrutinize the circumstances surrounding the statements with extreme care for any taint of psychological compulsion or intimidation. *Steigler*, 496 F.2d at 799.

18. In making our determination, we are mindful of the Supreme Court's caution that "custody" must not be read too broadly:

> [P]olice officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.

Mathiason, 429 U.S. at 495; *accord Steigler*, 496 F.2d at 799. In particular we note the Court's statement in *Miranda:*

> There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statements he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

384 U.S. at 478 (note omitted).

19. Petitioner came voluntarily and on his own initiative to the substation. The state police did not know why he was there. The first trooper left petitioner unattended while petitioner on his own accord removed his outer clothing. The detective testified that before he posed the questions he would have returned petitioner's operator's license and allowed him to leave had petitioner so requested. T.P. at 15-16. On this record we have no difficulty in concluding that petitioner was not in custody when the detective asked, "Why are we looking for you?" *Sullivan v. Alabama*, 666 F.2d 478, 482 (11th Cir. 1982); *see Mathiason*, 429 U.S. at 495; *Orozco v. Texas*, 394 U.S. 324, 325 (1969); *Barfield v. Alabama*, 552 F.2d 1114, 1118 (5th Cir. 1977). The admission of petitioner's response to that question therefore did not violate his fifth and fourteenth amendment privilege against self-incrimination.

20. Petitioner's response, "I killed that girl," was obviously highly incriminating. Although such an incriminating response undoubtedly heightened the detective's suspicion, it is police compulsion, and not the strength of

police suspicions, which places a suspect in custody. *See Beckwith*, 425 U.S. at 346-47.

> The more cause for believing the suspect committed the crime, the greater the tendency to bear down in interrogation and to create the kind of atmosphere of significant restraint that triggers *Miranda*. . . . But this is simply one circumstance, to be weighed with all the others.

Steigler, 496 F.2d at 799-800 (quoting *Hall*, 421 F.2d at 545).

21. The detective testified that petitioner remained free to leave the substation when the detective asked, "What girl?" T.P. at 5. The detective explained that only after petitioner gave the name of the girl and how he had killed her could the detective determine that the petitioner was not merely seeking personal aggrandizement by confessing to a sensational crime in which he had no part. T.P. at 3-4. Petitioner, on the other hand, does not allege that the state police did "anything different" after he had stated, "I killed that girl." *See* Brief for Petitioner on Petition for Writ of Habeas Corpus at 19-20, 22-23 ("Brief for Petitioner"). Instead petitioner takes the position that he was in custody from the moment he identified himself, and that "either all the statements were voluntary or all were invountary." *Id.* at 19; *see* Appellant's Brief at 33. In addition, we can find no evidence that the detective at that juncture used any additional "force or intimidation, physical or psychological, actual or implied," *Government of Virgin Islands v. Berne*, 412 F.2d 1055, 1060 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969).

22. Both the state trial court and the federal magistrate concluded that petitioner was not in custody until he responded, "Pamela Rimer." The district court agreed.

After examining the peculiar factual circumstances of this case we cannot conclude that the district court erred. We therefore hold that petitioner's privilege against self-incrimination was not violated by the admission of his statements "I killed that girl" and "Pamela Rimer."

II. FAIR AND IMPARTIAL JURY

A. *Facts and State Proceedings*

23. Clearfield County is a rural county with a population of approximately seventy thousand served by two newspapers with a total circulation of approximately twenty-five thousand. On April 29, 1966, each of the newspapers devoted its front page to the Rimer homicide and to petitioner's appearance at the substation. Both newspapers gave front-page coverage to the pre-trial proceedings, the voir dire of 104 veniremen, and the nine-day trial. In the Dubois *Courier Express* the publicity culminated in seventeen consecutive editions each bearing banner headlines and carrying at least two feature articles. The Clearfield *Progress* gave the case similarly intense coverage. As the papers related, public interest in the proceedings was unprecedented; *The Progress* later adjudged petitioner's trial the top news item of 1966.[6]

24. The coverage was as detailed as it was extensive, *see* app. at 135a, 136a. The newspapers related in full petitioner's detailed written confessions as well as his testimony at trial retelling the homicide. They also detailed petitioner's defense of temporary insanity, the charge and evidence of rape, and finally petitioner's conviction on October 7, 1966, of both rape and first-degree murder.

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[6] The case also received publicity in radio and television broadcasts, as well as in out-of-state and national publications.

25. Petitioner's cause continued to receive front-page coverage at every step of his appeal. Banner headlines announced the reversal of the conviction in *Yount I*. The dissent was reprinted in full, and a local radio program became a forum in which callers expressed their hostility to petitioner. As the second trial approached, newspaper coverage increased. The selection of each juror merited an article and often a profile. By the close of voir dire the two newspapers had printed sixty-six front-page articles on the appeal and retrial.[7]

26. Petitioner was returned to Clearfield for retrial before the same judge. On May 5, 1970, petitioner requested a change of venue. He claimed that the publicity which had saturated the county since the murder, and the continuing discussion of the case among residents, made a fair trial in Clearfield County impossible. In particular, petitioner alleged that the dissemination of prejudicial information outside of evidence was so widespread that it could not be eradicated from the minds of potential jurors. The prosecution argued in response that the case had received so much publicity across the state that it would be useless to change the venue. The trial court found that after the initiation of the appeal the newspapers had merely publicized the actions of the courts "without editorial comment of any kind." App. at 748a-49a. It denied the petition for change of venue on September 12, 1970.

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[7] Petitioner's second trial and his subsequent efforts to gain retrial or parole also received front-page coverage. Those efforts have provoked substantial community protests in Clearfield County. App. at 137a & n. 16. The magistrate found that even "at this late date, fifteen years after the crime, there is considerable public feeling in Clearfield County in opposition to the petitioner." App. at 136a-37a

27. Jury selection began on November 4, 1970, and took ten days, seven jury panels, 292 veniremen and 1186 pages of testimony. One hundred and twenty-five of the 292 veniremen were excused because they had not been chosen properly. Four others were dismissed for cause before they were questioned on the case. Of the 163 remaining venirement who were questioned, all but two had read of the case in the newspapers, had heard about it on radio or television, or were otherwise familiar with it. *See* app. at 135a, 137a. When asked whether they had discussed the case, had heard it discussed, or had heard others express their opinion as to petitioner's guilt or innocence, over ninety percent said that they had. *See* app. 135a, 137a.[8]

28. Of the 163 veniremen questioned on the case, 121 were dismissed for cause.[9] Ninety-six of those 121 veniremen were successfully challenged after they testified that they had firm and fixed opinions[10] which could not be changed regardless of what evidence was presented. *See* app. at 135a & n.13.[11] An additional 21 of the 121 venire-

[8] Ninety-six veniremen were asked, and 88 responded affirmatively.

[9] Petitioner made 114 successful challenges, the prosecution seven.

[10] After objection by respondent, petitioner was not permitted to ask each venireman what his opinion was. *See* Transcript of Trial—Voir Dire at 86; Brief for Appellee at 13; Brief for Petitioner at 27-28. Many veniremen nonetheless volunteered that they thought petitioner was guilty because he had confessed to the crime or because he had been convicted in the first trial. Other veniremen remembered hearing members of the public express the opinion that petitioner was guilty. No venireman said he thought petitioner was not guilty.

[11]. Petitioner challenged 90 of those 96 veniremen. The prosecution challenged the remaining six.

men were dismissed for cause after they said that they had an opinion which they could change only if the petitioner could convince them to do so. *See* app. at 135a-36a & nn. 14, 15.[12] Thus 117 out of the 163 veniremen questioned were successfully challenged for cause after they said they could not set their opinion aside before entering the jury box.

29. There were also nine other veniremen, unsuccessfully challenged for cause by petitioner, who indicated that they had an opinion which they could change only if the petitioner could convince them to do so.[13] When we combine those nine with the 117 veniremen dismissed for cause, we find that a total of 126 out of the 163 veniremen questioned on the case were willing to admit on voir dire that they would carry their opinion into the jury box.[14]

30. Voir dire gave other indications of the depth of community sentiment. One veniremen, the wife of a minister, testified that she had heard too many opinions to be sure of her own. She was then asked:

> Q. Would your presence in serving as a juror create a difficulty in your parish?
>
> A. Why yes—when people heard my name was on for this—countless people of the church have come

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[12] Petitioner successfully challenged all 21 veniremen.

[13] Petitioner peremptorily challenged six of those nine veniremen, one was seated as a juror, and the remaining two were seated as alternates after petitioner had exhausted his peremptory challenges.

[14] In addition, we note that twelve other veniremen stated that they had had an opinion at one time but claimed they would not carry it into the jury box. One of the twelve veniremen was dismissed for cause, six were peremptorily challenged by petitioner, and five were seated as jurors.

to me and said they hoped I would take—the stand I would take in case I was called. I have had a prejudice built up from the people in the church.

Q. Is this prejudice, has it been adverse to Mr. Yount?

A. Yes it was. They all say he had a fair trial and he got a fair sentence. He's lucky he didn't get the chair.

* * *

[T]he church people—I haven't asked for any of this but they discuss it in every group—but they say now since you are chosen and you will be there we expect you to follow through.

Q. Notwithstanding what the court would tell you, you feel you would be subject to the retributions or retaliation of these people—

A. I think I would hear about it.

App. at 410a, 412a. Another prospective juror said that his opinion had been erased by the passage of time, but his daughter-in-law later testified that he had left for jury duty voicing great animosity toward petitioner. App. at 430a, 527a-28a.

31. After the first jury panel was exhausted, petitioner again moved for a change of venue. Although more than three quarters of the veniremen already questioned had admitted that they would carry an opinion into the jury box, the court orally denied the motion. On November 14, 1970, the trial court rejected petitioner's written motion for a change of venue. In its memorandum opinion, the trial court explained that the still-incomplete voir dire had taken so much time and covered so many venire-

men because the court had been lenient in permitting extended examination of prospective jurors and in granting challenges for cause. App. at 194a-95a. It said that "almost all, if not all, jurors seated had no prior or present fixed opinions." App. at 196a. The court noted

> that it has been 4 years since the first trial of this cause, and so far as this Court can recall, there has been little, if any, talk in public concerning the trial from that time to the time when it was announced that a trial date had been fixed.

Id. The trial judge found the publicity was not unfair to the petitioner. App. at 197a. He added that few spectators had attended voir dire, which he took as some indication "particularly in a community as small as ours" that the publicitiy had not had a great effect. *Id.*

32. In fact the publicity had reached all but one of the twelve jurors and two alternates finally empanelled.[15] Juror No. 1 said that he had read about the case and heard others express their opinions, but had never come to a "true" opinion. App. at 202a-04a, 207a. Juror No. 2 testified that he had recently discussed the case with others and had formed an opinion which was not firm and fixed and could be set aside. App. at 212a-15a, 218a-19a. The next

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[15] Juror No. 1 stated that "it was pretty hard to be here in Clearfield County and not read something in the paper." App. at 202a. Juror No. 2 said that "[y]ou could hardly miss it" on the radio and television news. App. at 212a. Juror No. 6 vounteered that "[i]t's rather difficult to live in DuBois and get the paper and find out what the people are talking about—at least the local people without having some opinion or at least reserving some opinion." App. at 275a-76a. Several potential jurors gave similar appraisals of the publicity's effect.

of the jurors to be selected, Juror No. 4,[16] had recently moved into Clearfield County and had never heard about the case. App. at 246a-52a. Juror No. 5 said that she "remembered that they had said he was guilty before" and wondered why petitioner was getting a new trial, but had no opinion and would try to forget what she knew. App. at 259a-63a.

33. Juror No. 6, James F. Hrin, testified that he had an opinion. He was then asked:

> Q. Would you be able to change your mind regarding your opinion before becoming a juror in this case. That's the way I must have you answer the question.
>
> A. If the facts were so presented I definitely could change my mind.
>
> Q. Would you say you could enter the jury box presuming him to be innocent?
>
> A. It would be rather difficult for me to answer.
>
> Q. Can you enter the jury box with an open mind prepared to find your verdict on the evidence as presented at trial and the law presented by the Judge?
>
> A. That I could do.
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> * * *
>
> Q. Did I understand Mr. Hrin you would require some—you would require evidence or something before you could change your opinion you now have?

[16] The venireman initially selected as Juror No. 3 was later excused for personal reasons.

A. Definitely. If the facts show a difference from what I had originally had been led to believe, I would definitely change my mind.

Q. But until you're shown those facts, you would not change your mind—is that your position?

A. Well—I have nothing else to go on.

App. at 271a-73a. After repeatedly reiterating that he would need evidence to change his opinion, Juror Hrin said, "I don't know if that's the answer you want." App. at 275a. Finally when asked yet again whether he could set his opinion aside, he replied, "I have to." App. at 276a. The court denied petitioner's challenge for cause, app. at 274a-75a, and petitioner did not exercise a peremptory challenge.

34. Juror No. 7 said that he had formed an opinion but added that he was not sure that he still had an opinion or that he could forget what he knew. App. at 285a-88a, 298a-99a. Juror No. 8 had heard others discussing the case and had had an opinion. App. at 304a-05a. She testified that she had none at present except "what he said himself —that he was guilty." App. at 309a-10a. She then said that she did not think she would consider in deliberations what she already knew. App. at 312a-13a. Juror No. 9 said that she had thought petitioner was guilty and wondered why a new trial was necessary, but added that now she would have to hear both sides before she could decide. App. at 322a-24a. Juror No. 10 had heard the opinions of others and had expressed his own. He admitted that it would be difficult to strike what he'd heard before, but stated that he felt petitioner should "have every opportunity to prove his innocence." App. at 336a, 338a-39a.

Juror No. 11 testified that he had read about the case but had not formed an opinion. App. at 347a, 349a, 357a.[17]

35. After petitioner had exhausted his peremptory challenges, two jurors and two alternates were seated over his challenges for cause. Both Juror No. 12 and replacement Juror No. 3 testified that they had heard about the case but had no opinion. App. at 362a-65a, 224a-28a. Alternate No. 1 stated that he had expressed an opinion which remained firm and fixed and which he would not put out of his mind until evidence was presented. App. at 380a-85a. Alternate No. 2 said that she had a definite opinion which she could not dismiss and which only evidence could change. App. at 395a-97a. Both alternates were sequestered with the jury; the jurors were told that they were free to discuss the case with other jurors when sequestered.

36. The trial lasted for four days. The prosecution presented quite a different case than it had at the first trial. Because of the Pennsylvania Supreme Court's holding in *Yount I*, the Commonwealth was unable to put into evidence petitioner's detailed written confessions. As a result, it chose not to retry petitioner on the rape charge. *See* 537 F. Supp. at 877.

37. The change in the defense was even more marked. Petitioner did not take the stand to retell and ex-

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[17] Petitioner did not challenge Jurors Nos. 1, 2, 4, 5, and 7-11. At the hearing on the habeas petition, petitioner explained that, because he had believed that a change of venue would not be granted and that a fair and impartial jury was impossible in Clearfield County, he had felt the jurors were "probably about as good as we are going to get." App. at 557a-58a; *see* Appellant's Brief at 16-17.

plain the events revealed in the now-excluded confessions. He did not renew his claim of temporary insanity. Instead petitioner relied solely upon cross-examination and character witnesses.

38. After he was again sentenced to life imprisonment, petitioner filed a post-conviction motion for a new trial on November 27, 1970. He claimed, *inter alia,* that the trial court erred in rejecting several of his challenges for cause and in denying his petitions for a change of venue. The trial court rejected those arguments and dismissed the motion on January 15, 1973. It stated that there had been "practically no publicity" during the four years between trial and retrial, and "practically no public interest" shown at the second trial as few had attended on some days. App. at 751a. Voir dire had taken such a long time, it explained, because petitioner "raised so many questions and the court exercised its discretion to assure that there could be no complaint about the final jury empanelled." *Id.*

39. The Pennsylvania Supreme Court adopted the trial court's post-conviction findings and affirmed the judgment of sentence on January 24, 1974. *Yount II,* 455 Pa. at 311-12, 314 A.2d at 247. It ruled that the petitions for a change of venue were directed to the second discretion of the trial court, and found no abuse of that discretion because "the record fails to disclose undue community prejudice." *Id.*, 455 Pa. at 312-14, 314 A.2d at 247-48.

B. *Proceedings Below*

40. In his petition for a writ of habeas corpus, petitioner claimed that his conviction was obtained in violation of his right to a fair, impartial, and "indifferent" jury.

In particular, he alleged that the trial court erred by refusing his motions for a change of venue.[18]

41. After two days of evidentiary hearings, the United States Magistrate recommended that the petition be granted. He noted that the case involved a sensational homicide in a small rural community and that extensive publicity had surrounded both trials. App. at 136a, 141a. He found "a strong community hostility toward the petitioner" as well as "pervasive community knowledge of the facts of the case." *Id.* at 141a. He characterized this case as one where

> the public has been fully informed of the fact that the charged defendant had confessed to the crime, and that he had been previously tried and convicted of both rape and murder, and where on retrial the confession is suppressed but the public remains very much aware of the circumstances surrounding the case and has formed definite opinions as to the guilt or innocence of the defendant.

Id. The magistrate calculated that over 70 percent of the veniremen and several of the jurors had testified that they had a fixed opinion, and stated that "a certain pall is cast

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[18] Brief for Petitioner at 25-34. Petitioner also assigned error to the denial of the challenges for cause he made to Juror No. 3, Juror No. 12, and four potential jurors. App. at 16a; Brief for Petitioner at 34-39. The district court found no constitutional infirmity. 537 F. Supp. at 882-83. Petitioner does not raise those challenges on appeal.

Petitioner does argue on appeal that the trial court erred in denying his challenges for cause to Juror Hrin and both alternate jurors. Appellant's Brief at 25. Our disposition of this appeal makes it unnecessary to consider whether those arguments are properly before us.

upon those in the minority who testified that they had not formed a fixed opinion and could judge the case on its merits." *Id.* at 140a-41a. In his view, the empanelled jury was incapable of deciding the case solely on the evidence before it "but rather at best required the petitioner to prove his innocence or at least overcome strong preconceived notions as to his guilt." *Id.* at 141a. The magistrate concluded that petitioner could not have received a fair trial by an impartial jury in Clearfield County.

42. The district court rejected the recommendation of the magistrate. Although the court recognized the community's "substantial knowledge" of the case, it decided after an independent review of the record that the publicity had not been vicious or excessive. 537 F. Supp. at 877. It noted that the trial court had granted extensive latitude in the voir dire and stated that the exhaustion of the first panel of veniremen was not remarkable. *Id.* at 877, 882. The district court in its independent review also determined that all the jurors at some point said they could set aside their opinions. *Id.* at 877-82. Throughout it emphasized that the factual findings of the state court judge were presumptively correct under 28 U.S.C. §2254(d) (1976). The district court concluded that petitioner had failed to carry his burden of establishing that actual prejudice had rendered a fair trial impossible.

C. *Discussion*

43. Petitioner argues on appeal that the exposure of the venire to prejudicial pretrial publicity, and the refusal to grant a change of venue, violated his sixth amendment rights.[19] The sixth amendment guarantees to the accused

[19] Petitioner in his brief separates his challenge based on pretrial publicity from his challenge based on the refusal to change

the right to be tried "by an impartial jury." U.S. Const. amend. VI. Under the due process clause of the fourteenth amendment, the states are required to effectuate that right by giving "a fair trial to the accused by a panel of impartial, 'indifferent' jurors," *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *accord Murphy v. Florida*, 421 U.S. 794, 799 (1975), "capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982); *see Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966).

44. To satisfy that constitutional standard the jurors need not be totally ignorant of the facts of a case. *Murphy*, 421 U.S. at 799-800. A juror who has read about the case, even one who has conceived some notion as to the guilt or innocence of the accused, may nonetheless serve "if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at 799 (quoting *Irvin*, 366 U.S. at 723); *see Martin v. Warden*, 653 F.2d 799, 804, 806 (3d Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982). At the same time, a juror's assurance that he can enter the jury box without an opinion is not dispositive if the accused can demonsrtate "the ac-

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venue. We consider the arguments to be inseparable. *See Martin v. Warden*, 653 F.2d 799, 802-06 (3d Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982). The pretrial publicity and its effects were the basis for petitioner's motions for a change of venue. Our inquiry in this habeas corpus proceeding is restricted to whether the refusal to change venue amounted to a violation of petitioner's constitutional rights. *Id.* at 804; *see Rideau v. Louisiana*, 373 U.S. 723, 726 (1963). There could be no constitutional violation unless petitioner was denied his constitutional right to an impartial jury because of pretrial publicity. *Beck v. Washington*, 369 U.S. 541, 556 (1962).

tual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." *Murphy*, 421 U.S. at 800 (quoting *Irvin*, 366 U.S. at 723); *see United States v. Provenzano*, 620 F.2d 985, 995 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980).

45. The petitioner challenging his state court conviction in a habeas corpus proceeding must shoulder a particularly heavy burden. Unlike a defendant seeking review of his federal conviction, the petitioner cannot argue that simply because his jury has read of extra-record facts with a high potential for prejudice, a federal court must presume that the jury was prejudiced. *Cf. Marshall v. United States*, 360 U.S. 310, 313 (1959) (per curiam) (federal conviction reversed under supervisory power). A federal court reviewing a state conviction on habeas corpus may presume prejudice only in extraordinary cases where "the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings." *Murphy*, 421 U.S. at 798-99; *see, e.g., Sheppard*, 384 U.S. 333 (extremely inflammatory publicity and a courthouse given over to carnival); *Estes v. Texas*, 381 U.S. 532 (1965) (trial in circus atmosphere); *Rideau v. Louisiana*, 373 U.S. 723 (1963) (twenty-minute confession repeatedly broadcast on television). The publicity in this case, though it had a high potential for prejudice, did not utterly corrupt the trial atmosphere in that fashion. *See Murphy*, 421 U.S. at 798; *Martin*, 653 F.2d at 805. Petitioner must therefore show "that the publicity has been so extreme as to cause *actual prejudice* to a degree rendering a fair trial impossible." *Martin*, 653 F.2d at 805 (emphasis added); *see Murphy*, 421 U.S. at 797-799; *Estes*, 381 U.S. at 542-44; *Martin*, 653 F.2d at 804-06; *United*

States ex rel. Greene v. New Jersey, 519 F.2d 1356, 1357 (3d Cir. 1975) (per curiam).[20]

46. To determine whether actual prejudice has been shown, we must examine the "totality of circumstances" for any indication that petitioner's trial was not fundamentally fair. *Dobbert v. Florida*, 432 U.S. 282, 303 (1977); *see Sheppard*, 384 U.S. at 352. In *Irvin v. Dowd*, 36 U.S. 712 (1961), the Supreme Court established the method by which such examinations are conducted. *See, e.g., Murphy*, 421 U.S. at 800-03; *Beck v. Washington*, 369 U.S. 541, 556-57 (1962); *see also Dobbert*, 432 U.S. at 302-03. First, the Court in *Irvin* considered the extent and content of the publicity because it was indicative of "the then current community pattern of thought." *Irvin*, 366 U.S. at 725-27. The Court then reviewed the voir dire. In the opinions expressed by potential jurors and the difficulty encountered in finding veniremen who could at least claim impartiality, the Court discovered evidence of a pattern of prejudice in the community. *Id.* at 727. Finally the Court looked to see whether that pattern of prejudice was reflected in the testimony of the jurors ultimately seated in

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[20] In addition, because petitioner is challenging a state conviction on a petition for a writ of habeas corpus, the factual findings of the state courts are presumed to be correct unless petitioner can establish by convincing evidence that the factual findings were erroneous. 28 U.S.C. §2254(d) (1976); *see Sumner v. Mata*, 449 U.S. 539 (1981). At the same time, we have a duty as a federal appellate court "to make an independent evaluation of the circumstances." *Sheppard*, 384 U.S. at 362. In particular, because the nature and strength of a venireman's opinion is a mixed question of law and fact, *Irvin*, 366 U.S. at 723, we must "independently evaluate the voir dire testimony of the impaneled jurors" and the potential jurors. *Id.; Martin*, 653 F.2d at 807; *see Cuyler v. Sullivan*, 446 U.S. 335, 341-42 (1980).

the jury box. *Id.* at 727-28. Considering all these factors, the Court then concluded that the jurors' assurances of impartiality had to be discounted. *Id.* at 728.

1. The Publicity

47. The publicity preceding petitioner's trial was extensive and had great potential for prejudice. As in *Irvin*, petitioner's case was a *"cause celebre"* in a rural community which had been subjected to a barrage of publicity concerning a sensational murder. *Irvin*, 366 U.S. at 725; *see Murphy*, 421 U.S. at 798. That publicity, although accurate, factual in nature, and without editorial comment, *see Murphy*, 421 U.S. at 800 n.4, 802; *Beck*, 369 U.S. at 556, revealed prejudicial information "never heard from the witness stand" in the second trial. *See Sheppard*, 384 U.S. at 356.

48. First, the publicity disclosed that the jury in the first trial had convicted petitioner of the murder. Few revelations could be so damning to an accused. *United States v. Williams*, 568 F.2d 464, 471 (5th Cir. 1978). Possibly even more prejudicial was the disclosure of petitioner's written confessions and his testimony at the first trial. *See Rideau*, 373 U.S. 723; *United States v. Haldeman*, 559 F.2d 31, 61 (D.C. Cir. 1976) (in banc) (per curiam), *cert. denied*, 431 U.S. 933 (1977); *see also United States ex rel. Doggett v. Yeager*, 472 F.2d 229, 231 (3d Cir. 1971). The confessions and testimony detailed in a highly unfavorable light petitioner's actions and thoughts at the time of the homicide. They were sworn revelations of information which petitioner's properly admitted oral statements simply did not convey. *Cf. Stroble v. California*, 343 U.S. 181, 195 (1952) (confession printed in newspaper was introduced into evidence); *see also United States v. D'Andrea*, 495 F.2d 1170, 1172-73 (3d Cir. (per

curiam), *cert. denied*, 419 U.S. 855 (1974). Finally, the publicity revealed that petitioner at the first trial had pled temporary insanity and had been convicted of rape. Such highly inflammatory facts carried too great a risk of prejudice to be directly offered as evidence. *See Marshall*, 360 U.S. at 312-13; *United States ex rel. Greene v. New Jersey*, 519 F.2d 1356 (3d Cir. 1975) (per curiam). "The exclusion of such evidence in court is meaningless when the news media makes it available to the public." *Sheppard*, 384 U.S. at 360; *see Murphy*, 421 U.S. at 802.

49. The publicity was understandably most extensive and most potentially prejudicial before and during petitioner's first trial, which was four years before his second trial. The passage of time may work to erase highly unfavorable publicity from the memory of a community. *See, e.g., Murphy*, 421 U.S. at 802; *Beck*, 369 U.S. at 556. In this case, however, voir dire revealed that more than 98 percent of the veniremen questioned remembered the case. In part this was due to the repeated community exposure provided by newspaper coverage of the appeal and retrial[21]

[21] The state trial court, though the record contained at least 17 front-page articles, said that between trial and retrial "there was practically no publicity given to this matter through the news media . . . except to report that a new trial had been granted by the Supreme Court." App. at 751a. We believe, however, that petitioner has established by convincing evidence that the state court's characterization of the coverage was erroneous. 28 U.S.C. §2254(d) (1976). The record on this petition indicates that 66 front-page articles were published covering the appeal and second trial. *Cf. Sumner v. Mata*, 449 at 547 (federal and state court had identical record). We agree with the magistrate who after two days of evidentiary hearings found that the second trial "was surrounded with publicity, but not to the same degree" as the first trial. App. at 136a.

which helped keep fresh the imprint of the case in the minds of the public.[22] More important, the publicity attending the homicide and first trial had been so extensive and intensive that the case was firmly implanted in the memories of Clearfield County residents.

50. Petitioner has established that the publicity before his second trial had revealed prejudicial information from his first trial, information which was not officially in evidence against him. The widespread dissemination of such extra-record information, while not rendering the jury presumptively prejudiced, poisoned the "general atmosphere of the community" in which petitioner was retried. *See Murphy*, 421 U.S. at 802. If petitioner can show that that atmosphere caused actual prejudice in the jurors, their assurances of impartiality can be disregarded. *Id.*

2. The Voir Dire

51. The difficulty of voir dire may provide crucial evidence that the sentiments of the community were so poisoned against an accused as to impeach the asserted indifference of his jurors. *Murphy*, 421 U.S. at 803. "The length to which the trial court must go in order to select

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[22] The trial court stated that "as far as this Court can recall" there was little talk in public concerning the second trial. App. at 196a. Veniremen during voir dire indicated, however, that there had been public discussion of the case, particularly in last weeks before retrial. Such discussion apparently did not reach the attention of the trial court.

The trial court also noted that few spectators had attended trial on some days, particularly during voir dire. Because petitioner alleges prejudice not from a "circus atmosphere" in the courtroom, *see Murphy*, 421 U.S. at 798; *Martin*, 653 F.2d at 805, but from public knowledge of extra-record facts occasional low attendence is a factor of limited significance.

jurors who appear to be impartial" reveals a great deal about those jurors' assurances of impartiality:

> In a community where most veniremen will admit to a disqualifying prejudice, there liability of the others' protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it.

Id. at 802-03.

52. In this case, as in *Irvin*, "impartial jurors were hard to find." *Irvin*, 366 U.S. at 727. In the long and difficult voir dire[23] 163 veniremen were questioned on the case. Our independent examination of the voir dire testimony shows that 126 prospective jurors, or 77 percent of the 163 veniremen questioned, admitted that they would carry an opinion into the jury box. The trial court itself excused on challenges for cause 117 of those veniremen, or 72 percent of the 163, after they stated that they could not set aside their opinion.[24] Only when petitioner had ex-

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[23] The trial court explained that the voir dire was lengthy because petitioner was permitted to ask so many questions. App. at 194a-95a, 751a. The court did indeed extend great leniency to petitioner in his questioning of the veniremen. Such leniency was commendable. It was also necessary under the circumstances, and does not explain away the difficulty of the voir dire as a real factor in our consideration.

[24] The trial court stated that the difficulty in selecting a jury was due in part to his leniency in granting challenges for cause. App. at 195a, 751a. In our independent evaluation, each of the 117 veniremen dismissed for cause by the trial court had expressed a disqualifying prejudice which required dismissal. In fact, as we have noted, the trial court refused to dismiss several veniremen who had expressed a disqualifying prejudice, and permitted some of them to sit as jurors.

hausted his peremptory challenges could enough jurors be found to fill the jury box. *Cf. Dobbert*, 432 U.S. at 302 (peremptory challenges not exhausted); *United States v. Gorel*, 622, F.2d 100, 103-04 (5th Cir.) (same), *cert. denied*, 445 U.S. 943 (1980).

53. In *Irvin* the trial court dismissed for cause 268 of 430 veniremen, or 62 pecrent, because they had fixed opinions concerning the petitioner's guilt. Almost 90 percent of those examined entertained some opinion as to guilt. 366 U.S. at 727. In those circumstances the Supreme Court "readily found actual prejudice against the petitioner to a degree that rendered a fair trial impossible." *Murphy*, 421 U.S. at 798; *accord United States ex rel. Bloeth v. Denno*, 313 F.2d 364, 368-69 (2d Cir. 1962) (in banc) (31 of 38 veniremen questioned had formed opinions), *cert. denied*, 372 U.S. 978 (1963). By contrast, in *Murphy* the Court found no basis to cast doubt on the juror's assurances of impartiality where only 20 of 78 veniremen questioned, or 26 percent, were excused because they disclosed an opinion as to guilt. *Id.* at 803; *accord Beck*, 369 U.S. at 556 (14 of 56 veniremen might have had opinions); *Martin*, 653 F.2d at 806 (23 of 81 veniremen questioned had opinions); *Brinlee v. Crisp*, 608 F.2d 839, 845 (10th Cir. 1979) (19 of 47 veniremen questioned had opinions), *cert. denied*, 444 U.S. 1047 (1980); *Haldeman*, 559 F.2d at 70 & n.56 (29-36 percent of veniremen arguably had opinions), *cert. denied*, 431 U.S. 933 (1977); *Mastrian v. McManus*, 554 F.2d 813, 818 (8th Cir.) (41 of 92 veniremen questioned had opinions), *cert. denied*, 433 U.S. 913 (1977).

54. In the instant case voir dire revealed other indications of a deep and bitter prejudice present in the community. One venireman apparently veiled his strong feel-

ings when testifying. Another said that her fellow parishioners tried to influence her to vote guilty. Many veniremen volunteered opinions of guilt, and over 90 percent of those asked said they had discussed the case or heard others express their opinions.

55. We believe that the voir dire in this case more strongly resembles that of *Irvin* than that of *Murphy*. *See Martin*, 653 F.2d at 806. Three-quarters of the veniremen admitted to an opinion of guilt which they could not set aside. "Where so many, so many times, admitted prejudice, [a juror's] statement of impartiality can be given little weight." *Irvin*, 366 U.S. at 728; *Martin*, 653 F.2d 806.

3. The Jurors Selected

56. The prejudice permeating the voir dire and the community was reflected in the voir dire testimony of the majority of the twelve jurors and two alternates ultimately placed in the jury box.[25] All but one of the jurors were

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[25] The alternate jurors were dismissed and did not participate in the jury's deliberations. An alternate who did not deliberate does not contaminate a jury unless there is reason to believe that the jury had been exposed to the alternate's prejudicial information or opinion. *See United States v. Vento*, 533 F.2d 838, 860-70 (3d Cir. 1976). In this case the jurors were told they could disucss the case among themselves when sequestered. For four days the two alternate jurors were seated and sequestered with the regular jurors. Even though there is no evidence that the prejudiced alternates talked to the regular jurors, such a sustained condition of "continuous and intimate association" operates to subvert the requirement that the jury's verdict be based on evidence developed from the witness stand. *See Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965) (jurors guarded by deputy sheriffs who were witnesses); *see also United States ex rel. Owen v. McMann*, 435 F.2d 813 (2d Cir. 1970), *cert. denied*, 402 U.S. 906 (1971).

familiar with the case, and several explicitly recalled petitioner's conviction or confessions. Eight out of fourteen jurors would admit that, before hearing any testimony, they had formed an opinion as to petitioner's guilt or innocence. *Cf. Irvin,* 366 U.S. at 727 (8 of 12 had formed opinions); *Denno,* 313 F.2d at 367-68 (8 of 16 had formed opinions).[26]

> With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man.

Irvin, 366 U.S. at 727 (citation omitted). Indeed, when asked whether they could set their opinions aside and forget what they had heard, many of the jurors gave uncertain and ambiguous answers. Even such equivocal assurances of impartiality were preferable to the open admissions of prejudice made by Juror Hrin and the two alternates, who went "so far as to say that it would take evidence to overcome their belief." *Id.* at 728; *Murphy,* 421 U.S. at 798.[27]

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[26] As a result of our independent evaluation, we must therefore reject the trial court's conclusion that "almost all, if not all, [of the first twelve] jurors . . . had no prior or present fixed opinions." App. at 196a.

[27] Petitioner did not challenge nine jurors. Because Pennsylvania at the time of retrial required that objection be made before the jury retired to deliberate, Pa. R. Crim. P. 1006(d) (1975), petitioner's failure to challenge a juror for cause waived objection to that particular juror, *Provenzano,* 620 F.2d at 996 n. 15, unless petitioner can show cause for failing to object and prejudice therefrom. *Rogers v. McMullen,* 673 F.2d 1185, 1188 (11th Cir. 1982); *Graham v. Mabry,* 645 F.2d 603, 606 (8th Cir. 1981); *see Engle*

57. It is hardly surprising that the assurances of impartiality given by petitioner's jurors were equivocal or negative. It is more surprising that some could indeed give blanket assurances of impartiality. Petitioner's jurors were members of a community barraged by publicity and alive with discussion, a community where three quarters of those called would admit to a disqualifying prejudice. Those jurors were then asked to forget that petitioner had been convicted of the murder, and rape, of Pamela Rimer. They were asked to forget how petitioner twice in writing and once on the stand had retold in detail that he had killed her, and how he had offered no defense except for temporary insanity. Those jurors were asked to forget all they knew and put their impressions and opinions aside. Such a request took insufficient account of "the frailties of human nature." *Irvin*, 366 U.S. at 728.

58. "Impartiality is not a technical conception. It is a state of mind." *Id.* at 724 (quoting *United States v. Wood*, 299 U.S. 123, 145 (1936)). We must view the jurors' assurances of impartiality in light of the pretrial publicity, the difficulty of voir dire, and the testimony of the jurors selected. We conclude that despite their assurances of impartiality, the jurors could not set aside their opinions and render a verdict based solely on the evidence presented in court. Petitioner has shown that the pretrial publicity caused actual prejudice to a degree rendering a

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v. Isaac, 456 U.S. 107, 130 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977). Where as here a fair trial was impossible not because of a particular juror but regardless of the particular jurors, challenge of any individual juror for cause is not required. Failure to challenge any of the jurors selected, however, is "strong evidence" that the accused thought the jurors were not biased. *Beck*, 369 U.S. at 557-58.

fair trial impossible in Clearfield County. After examining the totality of circumstances, we hold that petitioner's retrial was not fundamentally fair.

III. CONCLUSION

59. We will affirm that part of the district court's order holding that petitioner's constitutional right against self-incrimination was not violated by the admission into evidence of his oral statements. We will vacate that part of its order holding that retrial in Clearfield County did not infringe petitioner's right to a fair trial by an impartial jury.

60. Petitioner's detention and sentence of life imprisonment are in violation of the Constitution of the United States. He is therefore entitled to be freed from that detention and sentence. Petitioner is still subject to custody under the indictment, however, and he may be retried on this or another indictment. *Irvin*, 366 U.S. at 728.

61. We will remand the case to the district court with the direction that a writ of habeas corpus shall issue unless within a reasonable time the Commonwealth shall afford petitioner a new trial.

STERN, *District Judge*, concurring.

Under any test reflecting even the most minimal respect for the values embodied in the sixth amendment, we would be compelled to invalidate this conviction. My concern, however, is with the particular constitutional standard which for 175 years has guided the lower courts, which we are obligated to apply today, and which renders constitutional trials taking place under circumstances only slightly less shocking than those presented in this case.

In *Irvin v. Dowd*, 366 U.S. 717 (1961), the Supreme Court, crystalizing earlier language from *United States v. Burr*, 25 F. Cas. 49, 50-51 (C.C.D. Va. 1807) (No. 14,692g) (Marshall, C.J.); *Reynolds v. United States*, 98 U.S. 145, 155-156 (1878); *Spies v. Illinois*, 123 U.S. 131, 179-80 (1887), and *Holt v. United States*, 218 U.S. 245, 248 (1910), established that it is permissible to empanel a jury composed of 12 persons, all of whom have a preconceived opinion that the defendant is guilty, as long as each promises to "lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin*, 366 U.S. at 723. *Accord Murphy v. Florida*, 421 U.S. 794 (1975); *Martin v. Warden*, 653 F.2d 799 (3d Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982).

According to the *Irvin* Court: "[T]o hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard." *Irvin*, 366 U.S. at 723. I cannot see why it is "impossible" to obtain jurors who do not begin with a bias. The test I suggest would not disqualify a juror merely because he has been exposed to pretrial publicity; rather, only those who

represent that they have formed an opinion—irrespective of the degree of its fixation—must be excluded automatically from jury participation.

There can be but two possible explanations for the *Irvin* standard. The first is that it presumes to be meaningful: that a promise to lay aside an opinion, for example, that an accused high school teacher brutally killed one of his own students is either believeable or enforceable. Definitive refutation of this precept as a psychological matter is, of course, beyond my capabilities, but I would venture that no one of us would want to gamble our freedom on the ability of a person to erase a preformed opinion as to guilt.[1] Moreover, even if such self-imposed amnesia is possible as a cognitive event, surely its prediction is not reliable—that is, we cannot expect a person to know with any degree of accuracy at the time of voir dire whether or not he will be able to lay aside an opinion, however desirous he is of achieving that end. I see no reason to subject our jury system to the hazards of guesswork, particularly where the alternative is so easily achieved. Thus, I reject the *Irvin* standard as a means to insure impartial jurors.[2]

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[1] Commentators with psychological training have come to the same conclusion. *See, e.g.*, Comment, Fair Trial v. Free Press: The Psychological Effect of Pre-Trial Publicity on the Juror's Ability to be Impartial; A Plea for Reform, 38 S. Cal. L. Rev. 672, 682 & nn.53, 54 (1965); *see also* Stanga, Jr., Judicial Protection of the Criminal Defendant Against Adverse Press Coverage, 13 Wm. & Mary L. Rev. 1, 5 & n.23 (1971).

[2] The voir dire at the celebrated trial of "Boss" Tweed over 100 years ago provides a wonderful example of the strain imposed upon any notion of "impartiality" by the "laying aside" standard. Various veniremen, all of whom indicated a preformed opinion of some degree, revealed a variety of strategies by which they felt they could rid themselves of their initial partiality. In

The second conceivable rationale for the *Irvin* test is that it is a practical necessity, without which the empanelling of juries would be impossible. I simply refuse to be-

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listening to their voices, we must decide if it makes sense to continue the same dialogues today.

One venireman suggests that he is able to lay aside his opinion as a matter of duty:

> Q. If you were to go into that jury box, would you require any evidence whatever to remove the impression that you now have?
>
> A. Not as a juryman; no, sir.
>
> Q. Your belief as a juryman is a different thing from your belief as a man?
>
> A. If any one should come up in the street and tell me Mr. Tweed was an innocent man, I should not at once believe it unless he gave me some proof to the contrary; but in the jury-box I go in there free from any prejudice as a juryman I think that is the duty of the juryman, that it ought not to require any evidence at all to remove any impression. That is what I intended to convey in my answer to the judge.

Record of *People v. Tweed*, 50 How. Pr. 262 (N.Y. Sup. Ct. 1876) at 104. Another admits that the process is unpredictable:

> Q. If you were to go into the trial as a juror would you not carry that same [preformed] impression into the jury-box?
>
> A. I think if I was called upon to serve as a juror I could free my mind from all prejudice or impressions and act impartially; that is my belief.
>
> Q. Have you ever tested that belief in a like case?
>
> A. Never, sir.
>
> Q. It would be an experiment on your part?
>
> A. Certainly it would

Id. at 142-43. Another views the process as one of degrees of belief:

> The Court—I would like to have you give in your own way and in your own language the condition of your mind in regard to Mr. Tweed or his dealings with the city.

lieve that in a land as populous as ours, where potential jurors abound, the only way to assemble a group of 12 im-

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The Witness—My view is this: I read the newspaper like everybody else; I have heard the proceedings, and of the charges against Mr. Tweed like everybody else, I have certain superficial information; on that superficial information I have formed an opinion; that is all I have had to do, and all I have seen the necessity of doing; I have never looked into the case with any degree of particularity; I have never examined the evidence as a lawyer would have examined it. I have formed an opinion; I do not consider that I have formed what I call a decided opinion, because I have not looked into it so thoroughly as to entitle me to have that opinion, but I have given it this general superficial examination. I am now here and am called upon this struck jury, and if I am to serve as juryman, I believe that I can act conscientiously and fairly for Tweed and fairly for the County. I have been asked the question whether I would prefer that Tweed should succeed or the County, and I have answered that I should prefer that the County should succeed. I do not mean that I would have any bias which would make me decide against Tweed, for the County or against the County for Tweed; I would be prepared to decide according to the evidence.

Id. at 94-95. Another describes the process as a function of will:

Q. But could you, no matter what form of oath were put to you, enter upon the trial without having the impression upon your mind that Mr. Tweed has been guilty of those frauds?

A. I should try.

Q. Could you succeed?

A. I think so.

Q. You think that you could forget what you now believe?

A. I think I could dismiss it from my mind; forget it, no.

Id. at 204.

All of these veniremen were seated as competent jurors.

partial persons is to allow those with advance opinions to sit as long as they give a proper incantation of their ability to lay aside those opinions. If a jury cannot be selected without resort to persons with preformed views of a defendant's guilt, it should be a simple matter to transfer the case to another county. There is simply no societal interest advanced by seating a juror who has openly stated that he has a view concerning the defendant's guilt, notwithstanding that it can be "laid aside."

The vulnerability of the *Irvin* "laying aside" standard is only heightened where attempts to temper its potentially devastating consequences for a criminal defendant are examined. The *Murphy* Court pointed out that,

> [T]he juror's assurances that he is equal to this task [laying aside prior opinion] cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality."

Murphy, 421 U.S. at 800 (quoting *Irvin*, 366 U.S. at 723). I am at a loss to understand how a defendant would ever be able to demonstrate that despite a venireman's assurance that he is able to lay aside a preconception of defendant's guilt, there actually exists in the potential juror's mind a "fixed" opinion which cannot be extinguished.

My view of the proper standard by which to measure the propriety of seating a particular juror does away with the distinction between opinions that are "fixed" and those that are something less so, as a spectral analysis empty of meaning. A person with any opinion going to the issue of a defendant's guilt is simply unfit to serve on a jury. It is incredible to me that anyone would want to take the con-

trary view. Further, in a highly publicized case, I would discredit the denial of preconceived opinions where a significant percentage of those polled state that they hold opinions concerning the defendant. While the Court has recognized that veniremen prejudice may be presumed in the face of protestations to the contrary where most of the other prospective jurors admit to a disqualifying bias, *compare Irvin*, 366 U.S. at 727 (nearly 90 percent of veniremen have some opinion regarding defendant's guilt; prejudice in remainder presumed), *with Murphy*, 421 U.S. at 802 (roughly 26 percent of veniremen have an opinion; no presumption regarding remainder), I would not allow any jury to be empanelled where more than 25 percent of the veniremen state that they hold an opinion concerning the defendant's guilt. Where over one quarter of those polled indicate such bias, I have grave doubts as to the sincerity of representations of impartiality by others in the community.

It has long been the foundation of our legal system that, "[N]o man's life, liberty or property be forfeited as criminal punishment for violation of that law until there ha[s] been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." *Chambers v. Florida*, 309 U.S. 227, 236-37 (1940). I do not see how we can live by this ideal while continuing to apply the *Irvin* test. I would adopt a different standard, originating at the confluence of sense and simplicity, which would prevent any person from entering the jury box and becoming a judge of the facts if he has any preconceived view of the merits of the case.

GARTH, *Circuit Judge*, concurring in the judgment.

In this case Juror James F. Hrin, who sat in judgment of the petitioner, Jon Yount, admitted during his *voir dire* that until he was shown facts establishing Yount's innocence, he would find it difficult to change his opinion about Yount's guilt. Because I conclude that Hrin, by so testifying during the *voir dire*, demonstrated "the actual existence of such an opinion in the mind of [one of Yount's] juror[s] as will raise the presumption of partiality," *Murphy v. Florida*, 421 U.S. 794, 800 (1975); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961), I concur in the judgment of the court that a new trial is required.

My concurrence, however, is limited to the issue raised by Yount's charge that Juror Hrin had been improperly impaneled. Thus, while I agree with Judge Hunter that Yount's fifth amendment rights were not violated when his inculpatory statements were admitted at his second trial, I do not agree with Judge Hunter that pre-trial publicity required a change of venue. As I read the record, it was the failure of the trial judge to apply the principles of *Irvin, supra*, in excusing jurors for cause that resulted in an unfair trial. Thus, I restrict my vote for a remand and new trial solely to the issue of Juror Hrin's impaneling as a juror, and do not agree with Judge Hunter's thesis that the district court erred in denying a change of venue.

I.

As the majority notes, Yount had been convicted of murder and rape in 1966. After the Pennsylvania Supreme Court set aside both of these convictions in 1969, Yount

was tried a second time for murder in November of 1970. The voir dire in this second trial exhausted ten days and 167 veniremen,[1] 121 of whom were dismissed for cause.

Among the twelve jurors and two alternates selected to try Yount, six testified that they had formed no opinions as to Yount's guilt. Five jurors stated that they had formed opinions about the case, but that they could lay those opinions aside and keep an open mind. Finally, three jurors—both of the alternates and Juror James F. Hrin—testified that they had opinions of Yount's culpability but could change these opinions if the proper evidence were presented.[2]

Juror Hrin's voir dire examination by the prosecution disclosed that Hrin was uncertain whether he could render a verdict based solely on the evidence adduced at trial. Responding to two questions by the prosecutor, Hrin asserted that he "wouldn't say for sure" whether he could "erase or remove the opinion" he held, but stated a second time that he could do so. Hrin's answers were punctuated with suggestions that he thought he "possibly could" render a fair verdict, and that "[i]t would be rather diffi-

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[1] Two hundred ninety-two persons were selected as talesmen for Yount's second trial, 125 of whom the court dismissed as improperly chosen after learning that the Clearfield County sheriff had selected friends and acquaintances of his own in order to obtain a full complement of jurors. The court dismissed an additional four jurors for cause before questioning. Although the Magistrate's report lists 168 jurors who were questioned, I agree with Judge Hunter that the record reveals only 167.

[2] Neither alternate juror participated in the jurys' deliberations. Their impartiality is not challenged before us.

cult for me to answer" whether he "could enter the jury box presuming [Yount] to be innocent."[3]

Under cross-examination by counsel for the defendant Yount, Hrin asserted that he would require the production

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[3] Hrin's voir dire examination by the prosecutor was as follows:

Q. Have you formed any opinion as to the guilt or innocence of Mr. Yount?

A. To the degree that it was written up in the papers, yes.

Q. Is this a fixed opinion on your part?

A. This is sort of difficult to answer.

Q. Let me ask—if you were to be selected as a juror in this case and take the jury box, could you erase or remove the opinion you now hold and render a verdict based solely on the evidence and law produced at this trial.

A. It is very possible. I wouldn't say for sure.

Q. Do you think you could?

A. I think I possibly could.

Q. Then the opinion you hold is not necessarily a fixed and immobile opinion?

A. I would say not, because I work at a job where I have to change my mind constantly.

Q. Would you be able to change your mind regarding your opinion before become a juror in this case? That's the way I must have you answer the question.

A. If the facts were so presented I definitely could change my mind.

Q. Would you say you could enter the jury box presuming him to be innocent?

A. It would be rather difficult for me to answer.

Q. Can you enter the jury box with an open mind prepared to find your verdict on the evidence as presented at trial and the law presented by the Judge?

A. That I could do.

of evidence before he would abandon any opinion of Yount's guilt. Hrin stated as follows:

> Q. Did I understand Mr. Hrin you would require some—you would require evidence or something before you could change your opinion you now have?
>
> A. Definitely. If the facts show a difference from what I had originally had been led to believe, I would definitely change my mind.
>
> Q. But until you're shown those facts, you would not change your mind—is that your position?
>
> A. Well—I have nothing else to go on.
>
> Q. I understand. Then the answer is yes—you would not change your mind until you were presented facts?
>
> A. Right, but I would enter it with an open mind.
>
> Q. In other words, you're saying that while facts were presented you would keep an open mind and after that you would feel free to change your mind?
>
> A. Definitely.
>
> Q. But you would not change your mind until the facts were presented?
>
> A. Right. . . .

Yount promptly challenged Juror Hrin for cause, a challenge the trial court denied because "he declared he could go in there with an open mind." The trial court reasoned as follows:

> I deny the challenge for cause because he declared he could go in there with an open mind; and Commonwealth against Bentley [287 Pa. 539, 135 A. 310

> (1926)] sets forth that—any juror is incompetent who has a fixed and definite opinion which cannot be erased by hearing and evidence—and he said he could disregard it and be guided by the law and evidence, and I believe he stated he could go in with an open mind. I would accept that as being sufficient to overcome the conviction that you proposed that he has a fixed opinion that he could not put aside and I think his answers were unequivical [sic] enough as to any fixation as to opinion as he declared although he had a solid opinion it is not quite as solid as it used to be which indicates that it is not solid. His expression is such that there is not now a fixed opinion and therefore I so accept it.

On appeal, the Pennsylvania Supreme Court concluded summarily that "[t]he record shows that none of the jurors had a fixed opinion as to appellant's guilt or innocence, or was otherwise legally unable to serve." *Commonwealth v. Yount*, 455 Pa. 303, 314, 314 A.2d 242, 248 (1974).

On January 8, 1981, Yount filed *pro se* a petition for habeas corpus. Paragraph 12-B of the petition asserted in part that "two [jurors] stated that they would require Petitioner to prove his innocence." In light of the record in this case, it is patent that one of the jurors referred to in paragraph 12-B is Juror Hrin.[4] The district court reviewed

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[4] There is therefore no question that the issue of Hrin's partiality is before us on appeal. *See United States ex rel. Hickey v. Jeffes*, 571 F.2d 762, 766 (3d Cir. 1978) ("[w]e can consider any issue, previously considered by the Pennsylvania courts, which was presented to the district court and would be ground for a reversal"). I assume that the other juror referred to in paragraph 12-B was an alternate juror. No alternates were substituted for members of the jury which convicted Yount. *See* note 2 *supra*.

pertinent portions of each of the jurors' voir dire testimony, including Hrin's, but did not concentrate on Hrin's testimony in particular, and made no findings respecting it. *See Yount v. Patton*, 537 F. Supp. 873, 880 (W.D. Pa. 1982). Yount argues before us on appeal that Hrin had abandoned the presumption of innocence, and that Yount could not constitutionally be convicted by a panel containing such a juror.

II.

As the Supreme Court in *Nebraska Press Association v. Stuart* stated, "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." 427 U.S. 539, 554 (1976). In order to explain fully why I do not believe the district court erred in denying a change in venue due to alleged prejudicial publicity, it is useful to review those circumstances in which jury exposure to adverse publicity does require a new trial.

First, the accused may demonstrate the actual existence of prejudice attributable to pretrial publicity on the part of one or more members of the jury. *See Irvin v. Dowd*, 366 U.S. 717, 723 (1961). Such prejudice must be shown "not as a matter of speculation but as a demonstrable reality," *United States ex rel. Darcy v. Handy*, 351 U.S. 454, 462 (1956), and is usually established by reliance on the jurors' *voir dire* responses. *See United States v. Chagra*, 669 F.2d 241, 250 (5th Cir.), *cert. denied*, 103 S.Ct. 102 (1982).

Second, in extreme cases of highly inflammatory pretrial publicity which saturates the community from which the jury is drawn, the accused may rely on a presumption of partiality, and need not prove actual bias. *See Rideau*

v. Louisiana, 373 U.S. 723, 726-27 (1963); *cf. Murphy v. Florida*, 421 U.S. 794, 802-03 (1975); *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir. 1980), *cert. denied*, 451 U.S. 913 (1981). This presumption is rebuttable, however, and the prosecution may demonstrate the impartiality of the jury by reliance on the *voir dire* testimony. *See United States v. Chagra, supra*, 669 F.2d at 250, 252-54; *United States v. Johnson*, 584 F.2d 148, 154 (6th Cir. 1978), *cert denied*, 440 U.S. 918 (1979); *United States v. Gullian*, 575 F.2d 26, 29-30 (1st Cir. 1978).

Third, the accused can demonstrate "a significant possibility of prejudice," *United States v. Davis*, 583 F.2d 190, 196 (5th Cir. 1978), and that the *voir dire* procedure was inadequate to permit its discovery. *See United States v. Blanton*, 700 F.2d 298, 307-08 (6th Cir. 1983); *United States v. Dellinger*, 472 F.2d 340, 374-75 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973); *Silverthorne v. United States*, 400 F.2d 627, 639 (9th Cir. 1968); *cf. United States v. Capo*, 595 F.2d 1086, 1092 n.6 (5th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980); *United States v. Haldeman*, 559 F.2d 31, 64-71 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); *United States v. Addonizio*, 451 F.2d 49, 65-67 (3d Cir. 1971), *cert. denied*, 405 U.S. 1048 (1972).

In addition, in two classes of cases the accused may assert that events transpiring during the course of trial rendered the trial unfair. In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), and *Estes v. Texas*, 381 U.S. 532 (1965), the Supreme Court condemned the conduct of trials "utterly corrupted by press coverage." *See Dobbert v. Florida*, 432 U.S. 282, 303 (1975). In these cases, the presence of the press during trial rendered the conduct of

a fair trial impossible.[5] A similar intrusion into the trial process occurs when members of the jury are exposed to publicity *during* the trial. *See Marshall v. United States*, 360 U.S. 310, 311 (1959); *Goins v. McKeen*, 605 F.2d 947, 952-54 (6th Cir. 1979); *United States v. Williams*, 568 F.2d 464, 468 (5th Cir. 1978); *United States v. Jones*, 542 F.2d 186, 194-97 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976).

In this case, no juror was exposed to adverse publicity during trial, and the record reflecting the publicity preceding Yount's second trial, in my opinion, was not so inflammatory as to give rise to a presumption of partiality. In addition, it is conceded that the trial court "extend[ed] great leniency to [Yount] in his questioning of the veniremen," Maj. op., typescript at 33 n.23, and no argument is raised that the *voir dire* was less than ample to expose the prejudices of potential jurors. Therefore, the only basis for upsetting Yount's conviction is the existence of the "actual prejudice" of one or more members of the jury.

An accused may demonstrate "actual prejudice" on the part of the jury in two ways. First, the defendant may

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[5] Although *Rideau v. Louisiana*, *Sheppard v. Maxwell*, and *Estes v. Texas* are frequently discussed as a unit, *see, e.g.*, *United States v. Dozier*, 672 F.2d 531, 545-46 (5th Cir.), *cert. denied*, 103 S. Ct. 256 (1982), *Sheppard* and *Estes* should be recognized as analytically distinct from *Rideau*. *Rideau* represents the only instance in which the Supreme Court has reversed a conviction solely on the basis of the extent and nature of pretrial publicity without a showing of actual prejudice. *See Mayola v. Alabama*, *supra*, 623 F.2d at 997. *Sheppard* and *Estes*, in contrast, represented intrusions into the trial process which undermined the integrity of the trial. *See United States v. Chagra*, *supra*, 669 F.2d at 249 n.10; *United States v. Haldeman*, *supra*, 559 F.2d at 61 n.32.

establish, by means of the *voir dire* testimony, that one or more jurors had a preconceived opinion of the defendant's guilt which could not be set aside in order to "render a verdict based on the evidence presented in court." *Irvin v. Dowd, supra,* 366 U.S. at 723. In such a case, the trial court would err by not granting a challenge to this juror for cause. A change of venue, however, would not be required if the challenge for cause were granted.

Second, in extremely rare circumstances the accused may establish "actual prejudice" by inference. *See Murphy v. Florida,* 421 U.S. 794, 803 (1975). In such a case the defendant must demonstrate "a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own." *Id.* In the only Supreme Court case to rely on this ground, *Irvin v. Dowd,* ninety percent of those examined on the point had a preconceived notion of the defendant's guilt, and eight persons who actually sat in judgment of the defendant thought the defendant guilty, 366 U.S. at 727. Indeed, just recently this court refused to apply the *Irvin* principle to reverse a conviction in which only 23 of 71 persons known to be exposed to pretrial publicity had fixed opinions of the defendant's guilt. *Martin v. Warden,* 653 F.2d 799, 806 (3d Cir. 1981), *cert. denied,* 454 U.S. 1151 (1982). Thus while I agree that if the defendant establishes the existence of a community "so poisoned against the [defendant] as to impeach the indifference of jurors who displayed no animus," then a change of venue is required, I do not agree that merely because a number of prospective jurors harbor opinions of guilt, that the *voir dire,* fairly conducted, cannot screen the biased from the fair-minded.

A showing of actual prejudice by this method is not to be lightly accomplished. As the Fifth Circuit stated in *United States v. Dozier*, 672 F.2d 531, 546 (5th Cir.), *cert. denied*, 103 S.Ct. 256 (1982), "detection of actual prejudice is not accomplished through juggling statistics." *Irvin* does not establish a bright-line rule that a venire containing a percentage of biased talesmen above a certain level to presumptively bad. Rather, the court must examine the totality of the circumstances, including the adequacy of the *voir dire* in ferreting out biased jurors, in order to establish whether a change of venue is constitutionally required.

A thorough and skillfully conducted *voir dire* should be adequate to identify juror bias, even in a community saturated with publicity adverse to the defendant. As the District of Columbia Court of Appeals noted, "voir dire has long been recognized as an effective method of rooting out such bias, especially when conducted in a careful and thoroughgoing manner." *In re Application of National Broadcasting Co.*, 653 F.2d 609, 617 (D.C. Cir. 1981) (footnotes omitted). For this reason the courts of appeals have repeatedly expressed "confidence in the effectiveness of a skillful voir dire to counteract the threat of pretrial publicity." *United States v. Duncan*, 598 F.2d 839, 865-66 (4th Cir.), *cert. denied*, 444 U.S. 871 (1979). Reviewing the conviction of Lieutenant William Calley for the killing of civilians at My Lai, a trial that generated considerably more pretrial publicity than Yount's second trial in 1970, the Fifth Circuit observed that "[t]here has been a greater willingness to uphold a trial court's determination that jurors were capable of rendering an impartial verdict where that conclusion was reached after deliberate, searching, and thorough *voir dire*." *Calley v. Callaway*, 519 F.2d

184, 209 n.45 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). *See also Graham v. Mabry*, 645 F.2d 603, 611 (8th Cir. 1981); *United States v. Capo*, 595 F.2d 1086, 1091-92 (5th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980); *Margoles v. United States*, 407 F.2d 727, 729-31 (7th Cir.), *cert. denied*, 396 U.S. 833 (1969).

As *Irvin* makes plain, a juror's subjective affirmation of impartiality is not dispositive of the question of juror bias. It has always been clear that "merely going through the form of obtaining jurors' assurances of impartiality is insufficient." *United States ex rel. Bloeth v. Denno*, 313 F.2d 364, 372 (2d Cir.), *cert. denied*, 372 U.S. 978 (1963). Instead, the trial court must determine independently and objectively whether the jurors' assurances are credible. *See United States v. Blanton*, 700 F.2d 298, 307-08 (6th Cir. 1983); *United States v. Gerald*, 624 F.2d 1291, 1296-97 (5th Cir. 1980), *cert. denied*, 450 U.S. 920 (1981). The American Bar Association's Standards for Criminal Justice provide that the *voir dire* "shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how any exposure has affected that person's attitude toward the trial." *ABA Standards for Criminal Justice* §8-3.5 (2d ed. 1978). The objective evaluation of this information, however, rests with the trial court. In *Irvin*, the trial court (which itself questioned the jurors challenged for cause) did not engage in a searching and thorough *voir dire*. Instead, the court erroneously credited the jurors' subjective opinions that each could render an impartial verdict notwithstanding his or her opinion. *Irvin v. Dowd, supra*, 366 U.S. at 724.

Yount's case, however, differs significantly from *Irvin v. Dowd*. First, counsel themselves conducted the

voir dire in Yount's trial and, as Judge Hunter concedes, were afforded great leniency in the questioning of veniremen. Second, Yount challenged only three jurors for cause, and two of those jurors, according to the district court's findings, "indicated that they harbored no fixed opinion." *Yount v. Patton, supra,* 537 F. Supp. at 878. Third, the trial court permitted questioning on the exposure of each juror to publicity and the degree of fixation of each juror's opinion. Six of the jurors testified that they had no preconceived opinion of Yount's guilt at all. Among the remaining six jurors, Yount challenged only one—Juror James F. Hrin, whom I discuss below—for cause. The scope and depth of the *voir dire,* and the absence of challenges for cause to each juror except Hrin, was adequate to support an independent and objective determination that, with the exception of Hrin, the jurors could "lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court." *Irvin v. Dowd, supra,* 366 U.S. at 723.

Judge Hunter, however, discounts the extensive *voir dire* conducted in Yount's 1970 trial and the absence of challenges for cause to each juror except Hrin. Rather, Judge Hunter's opinion places great weight on the finding that "77 percent of the 163 veniremen questioned admitted that they would carry an opinion into the jury box." Maj. op., typescript at 33. To my mind, this reliance on statistics, without regard to the scope of the *voir dire* or the absence of challenges for cause, elevates to talismanic significance the percentage of veniremen *as a whole* with opinions about a defendant's guilt. I do not believe *Irvin v. Dowd* was ever intended to be read in this fashion. If the scope of the *voir dire* is ample—as it concededly is in this case—the fact that a large percentage of persons who

are *not* on the jury have prejudices should carry little weight.

There are undoubtedly many communities in which large percentages of the veniremen have been exposed to pretrial publicity and have a notion of the defendant's guilt. The well-publicized trials of the Watergate defendants, *see United States v. Haldeman, supra,* and of Lieutenant William Calley, *see Calley v. Callaway, supra,* are undoubtedly of this character. But, the very function of the *voir dire* is to root out such persons with preconceived prejudices and identify only those who can, by the trial court's independent determination, lay aside any prejudices and render a verdict based solely on the evidence adduced during trial. Thus, given a *voir dire* which is concededly adequate and which functions to achieve its designed purpose, a venue change is not constitutionally required simply because many of the persons who will *not* serve on the defendant's jury may harbor prejudices as to the defendant's guilt.

For these reasons, I do not join Judge Hunter's holding that a change of venue in Yount's case was constitutionally required. Nevertheless, I concur in the judgment of the court because I conclude, for the reasons that follow, that Juror James F. Hrin should not have been impaneled in this case.

III.

In *Irvin v. Dowd,* 366 U.S. 717 (1961), the Supreme Court held that the mere existence of any preconceived notion as to the guilt or innocence of an accused is not, without more, sufficient to rebut the presumption of a prospective juror's impartiality. *Id.* at 723. As the Court observed, however, the adoption of such a rule does not

" 'foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law.' " *Id.*, quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941).

The test of a prospective juror's impartiality, articulated in *Reynolds v. United States*, 98 U.S. 145 (1878), and reiterated in *Dowd, supra*, is whether

> "the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality. . . . The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside." [*Reynolds v. United States*, 98 U.S. 145, 156-57 (1878).]

Irvin v. Dowd, supra, 366 U.S. at 723. *See Murphy v. Florida*, 421 U.S. 794, 800 (1975).

Hrin's voir dire testimony, taken as a whole, demonstrates the "actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." Even the testimony adduced by the prosecution raised serious doubts whether Hrin entered the jury box with an open mind. The record reveals that Hrin asserted simultaneously that he could keep an open mind and that he could not "say for sure" whether he could do so. In response to the question whether Hrin "could enter the jury box presuming [Yount] to be innocent," Hrin conceded that "[i]t would be rather difficult for me to answer."

Testimony adduced by the defense further revealed that Hrin would require Yount to produce evidence before Hrin would abandon his preconceived opinion of Yount's guilt. Hrin affirmed that he "would not change [his]

mind until [he] was presented [with] facts." Having so stated, Hrin abandoned the presumption of innocence. While the law permits a juror to affirm that he or she will enter the jury box with an open mind, a juror cannot require that the defendant produce evidence to wipe clean a prior perception or opinion. The jurors must be impartial when sworn. They cannot agree to be impartial only if the defendant convinces them to be so.

In this case, a juror, by his own admission, required the production of evidence to change his preconceived opinion of the defendant's guilt, and agreed to keep an open mind about this evidence if and when he heard it. As a matter of law, this admission raises a presumption of partiality. A defendant cannot constitutionally be convicted by a jury containing one such juror. *Irvin v. Dowd, supra,* 366 U.S. at 723; *id.* at 728 ("some [jurors went] so far as to say that it would take evidence to overcome their belief").

IV.

In concluding as a matter of law that Juror Hrin's testimony raises a presumption of impartiality under *Irvin v. Dowd, supra,* I am fully cognizant that in a federal habeas corpus proceeding, the findings of a state court "shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear. . . ." 28 U.S.C. §2254(d) (1976); see *Sumner v. Mata,* 449 U.S. 539, 551 (1981). Under *Irvin v. Dowd,* however, an opinion of a prospective juror raises a presumption of partiality by operation of law, and therefore poses a mixed question of law and fact. As the Court in *Dowd* stated,

> the test is 'whether the nature and strength of the opinion formed are such as in law necessarily . . .

> raise the presumption of partiality. The question thus presented is one of mixed law and fact. . . . As was stated in *Brown v. Allen*, 344 U.S. 443, 507, the "so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge." It was, therefore, the duty of the Court of Appeals to independently evaluate the *voir dire* testimony of the impaneled jurors.

Irvin v. Dowd, supra, 366 U.S. at 723.

In this case the Pennsylvania Supreme Court concluded that "none of the jurors had a fixed opinion as to [Yount's] guilt or innocence." *Commonwealth v. Yount, supra*, 455 Pa. at 314, 314 A.2d at 248. Nevertheless, the trial court found that Hrin had a "solid opinion [although] not quite as solid as it used to be." Neither the trial court nor the Pennsylvania Supreme Court, however, considered the legal effect of Hrin's requirement that the defendant put on evidence to disabuse Hrin of this opinion. This latter requirement raises a presumption of partiality as a matter of law, and therefore does not implicate 28 U.S.C. §2254(d). *Cf. Smith v. Phillips*, 455 U.S. 209, 218 (1982) (in which no such presumption by operation of law applied); *see* id. at 222 n.* (O'Connor, J., concurring).

V.

The sixth amendment guarantees to each defendant a fair and impartial trial by a jury of his or her peers. The right to trial by impartial jury, old as the Magna Carta, is fundamental to our system of justice. *See Duncan v. Louisiana*, 391 U.S. 145, 151-56 (1968). Consistency with this constitutional provision requires that each juror lay aside a prior perception or opinion and "render

a verdict based on the evidence presented in court." *Irvin v. Dowd, supra,* 366 U.S. at 723. Consequently, no juror may enter the jury box with an opinion that can be changed only upon the presentation of evidence by the defense. Juror Hrin admitted to requiring such evidence, and therefore could not constitutionally sit in judgment of Yount. Accordingly, while I dissent from the view expressed in Judge Hunter's opinion that a change of venue was constitutionally required, I concur in the judgment of the court, which directs that the writ of habeas corpus be issued unless Yount is retried within a reasonable time. I do so, however, only for the reason that Juror Hrin was improperly seated.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5372

JON E. YOUNT, Appellant

vs.

ERNEST S. PATTON, SUPERINTENDENT, SCI—CAMP HILL, and HARVEY BARTLE III, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA

(D. C. Civil No. 81-234)

On Appeal From the United States District Court for the Western District of Pennsylvania

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Present: HUNTER and GARTH*, *Circuit Judges,* and STERN, *District Judge***

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* Judge Garth took part in oral argument and in conference in this case. Thereafter he became ill. He will file a separate opinion at a later date.

** Honorable Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel December 17, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered April 22, 1982 be, and the same is, hereby affirmed insofar as the order of said District Court held that petitioner's constitutional right against self-incrimination was not violated by the admission into evidence of his oral statements, vacated insofar as it held that retrial in Clearfield County did not infringe petitioner's right to a fair trial by an impartial jury, and the cause remanded to the District Court with the direction that a writ of habeas corpus shall issue unless within a reasonable time the Commonwealth shall afford petitioner a new trial.

No. 82-5372
May 10, 1983

ATTEST:
(s) Sally Mrvos
Clerk

May 10, 1983

QUESTIONS PRESENTED FOR REVIEW

1. Whether pre-trial publicity of Respondent's re-trial infringed on his ability to select and impanel a fair and impartial jury in light of the provisions of the Sixth Amendment to the Constitution of the United States.

2. Whether a federal court in reviewing a state court conviction by way of a habeas corpus petition may disregard the sworn testimony of jurors to remain impartial and find that the defendant was denied a fair trial on the basis that the jurors were biased by pre-trial publicity.

3. Whether the federal court of appeals improperly applied the standards set forth in *Marshall v. United States*, 360 U.S. 310 (1959), as to juror prejudice to a state court conviction thereby violating the holding set forth in *Murphy v. Florida*, 421 U.S. 794 (1975).

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit has not yet been reported. It is, however, set forth in the Appendix at 1a.

The opinion of the United States District Court for the Western District of Pennsylvania is reported at 537 F. Supp. 873 (W.D. Pa., 1982), and is set forth in the Appendix at 54a.

The opinion of the Supreme Court of Pennsylvania is reported at 455 Pa. 303, 314 A.2d 242 (1974), and is set forth in the Appendix at 82a.

STATEMENT OF JURISDICTION

On April 22, 1982, the United States District Court for the Western District of Pennsylvania denied Respondent's petition for a writ of habeas corpus with prejudice. Respondent appealed this order to the United States Court of Appeals for the Third Circuit which on May 10, 1983 vacated the judgment of the District Court and directed that the writ of habeas corpus should be granted unless the Commonwealth affords Yount with a new trial within a reasonable period of time. From such an order granting a new trial, the Petitioners now file a petition for writ of certiorari with this Court.

On May 25, 1983, pursuant to motion of the Petitioners herein and Rule 41 (b) of the Federal Rules of Appellate Procedure, the United States Court of Appeals for the Third Circuit entered an order staying issuance of the certified judgment to June 30, 1983. It was further stated that if during the period of the stay it received notification from the Clerk of the Supreme Court that a petition for writ of certiorari had been filed, the stay would continue until final disposition by the Supreme Court.

The jurisdiction of the Supreme Court to review the decision of the United States Court of Appeals for the Third Circuit is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision which is involved in the instant matter being the Sixth Amendment to the United States Constitution which provides:

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On April 28, 1966, the body of Pamela Sue Rimer, a senior at Dubois Area High School who resided near Luthersburg, Pennsylvania was found in a wooded area adjoining a red-dog road leading from her school bus stop to her rural home. The autopsy revealed that the cause of death was due to shock, loss of blood and strangulation due to an excess of blood in her lungs. Examination revealed numerous wounds about the girl's head caused by a blunt weapon, three slashes across her throat and cuts of the fingers on her left hand, caused by a sharp instrument. When found, the girl's body was not fully clothed, in that one stocking and one shoe had been removed and the stocking tied about her neck.

Respondent, Jon E. Yount, was arrested April 29, 1966, on charges of murder and rape filed to No. 2 May Sessions 1966 in the Court of Quarter Sessions of Clearfield County, Pennsylvania. The case proceeded to trial on September 28, 1966, and on October 7, 1966, the Respondent was pronounced guilty by jury verdict of murder of the first degree and rape. The jury further pronounced sentence as life imprisonment. Following the denial of post-trial motions, Respondent appealed from the judgment of sentence to the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania reversed the conviction and ordered a new trial on the basis of *Miranda v. State of Arizona*, 384 U.S. 436 (1966), which had been decided in the period of time between the date of Respondent's arrest and the date of trial. *Commonwealth v. Yount*, 435 Pa. 276, 256 A.2d 464 (1969). The Common-

wealth appealed the ruling of the Pennsylvania Supreme Court with certiorari having been denied at 397 U.S. 925 (1970).

Prior to retrial, hearings were held on or about June 4, 1970, July 29, 1970 and August 17, 1970 with regard to Respondent's pre-trial motions as to change of venue on the basis of inability to select a fair and impartial jury and suppression of confessions and evidence obtained therefrom. The Court by memorandum and order filed September 21, 1970 denied the change of venue request and indicated that it would be bound by the guidelines as to suppression of evidence as set forth by the Supreme Court of Pennsylvania in its opinion rendered in the instant case found at *Commonwealth v. Yount*, 435 Pa. 276, 256 A.2d 464 (1969), *cert. denied*, 397 U.S. 925 (1970).

Jury selection for the retrial commenced on November 4, 1970, with the actual trial beginning on November 17, 1970. A second petition for change of venue was filed on November 13, 1970, during jury selection for the instant case, but was denied by memorandum and order of the Court dated November 14, 1970. On November 20, 1970 the jury returned a verdict of guilty of murder of the first degree. The rape charge was not tried by the Commonwealth at retrial. After denial of post-trial motions, the Respondent was formally sentenced on March 26, 1973. The judgment of sentence was appealed to the Supreme Court of Pennsylvania. That Court by opinion found at *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242 (1974), affirmed the judgment of sentence finding that Respondent had not been denied his right to a fair and impartial jury.

The Respondent, pursuant to 28 U.S.C. §2254, filed a petition for writ of habeas corpus pro se with the United

States District Court for the Western District of Pennsylvania on or about January 5, 1981. One issue within the habeas corpus petition dealt with whether Respondent had been able to select a fair and impartial jury. After counsel had been appointed to represent the Respondent and an answer had been filed, evidentiary hearings were held before the Honorable Robert C. Mitchell, United States Magistrate on November 3, 1981 and December 28, 1981 at which time both parties placed testimony on record with regard to the merits of the petition.

On February 12, 1982, the Honorable Robert C. Mitchell recommended that a writ of habeas corpus issue on the basis that the respondent, herein, could not have received a fair and impartial jury trial within Clearfield County. The Petitioners herein, filed objections to the magistrate's report and recommendations on February 19, 1982. After oral argument before the Honorable Donald E. Ziegler, United States District Judge, the petition for writ of habeas corpus was denied with prejudice by opinion and order dated April 22, 1982. The District Court expressly found that Yount had not been denied his right to select and impanel a fair and impartial jury within Clearfield County. On May 10, 1983, following the filing of an appeal and the presentation of oral argument, the United States Court of Appeals for the Third Circuit vacated the judgment of the District court and held that a writ of habeas corpus should issue unless the Commonwealth affords Yount a new trial within a reasonable period of time. The reason for such being that Yount had been denied his right to a fair trial by an impartial jury. The Petitioners now file this petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Third Circuit.

REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

The instant case presents to this Court a matter in which the United States Court of Appeals for the Third Circuit has rendered a decision on a federal question in conflict with that reached by the Supreme Court of Pennsylvania. Further, the Court of Appeals decision appears to be in conflict with the holding of this Court in *Murphy v. Florida*, 421 U.S. 794 (1975).

The Respondent herein, Jon E. Yount, was convicted in 1970, after retrial in the Court of Common Pleas of Clearfield County, Pennsylvania of the offense of murder of the first degree. Within his post-trial motions and appeal to the Supreme Court of Pennsylvania, Yount raised the issue that his Sixth Amendment right to select a fair and impartial jury had been infringed upon by the pre-trial publicity to which the venire had been exposed. The Supreme Court of Pennsylvania in applying the test established by this Court in *Irvin v. Dowd*, 366 U.S. 717 (1961), found that: "These findings (no excessive pretrial publicity) fully supported by the record, do not sustain appellant's claim, and the Court properly denied appellant's motion for a change of venue predicated on this theory." *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242, 247 (1974). The Court further stated, quoting *Irvin v. Dowd*, that: "Neither does the voir dire, as appellant argues, reveal a 'clear and convincing build-up of prejudice or a "pattern of deep and bitter prejudice" shown . . . throughout the community' which would require a change

of venue. Irvin v. Dowd, 366 U.S. 717, 725, 727, 81 S.Ct. 1639, 1644, 1645 [6 L.Ed. 2d 751] (1961)." *Commonwealth v. Yount,* 455 Pa. 303, 314 A.2d 242, 247 (1974).

In 1981, some ten (10) years after his conviction, the Respondent began the instant writ of habeas corpus action seeking to challenge his conviction and the decision made by the Supreme Court of Pennsylvania. When reviewing on assertion as to pre-trial publicity and change of venue in a habeas corpus proceeding from a state conviction, the federal court's review narrows considerably. "A state court conviction may be overturned in a habeas proceeding *only* where the defendant shows that the publicity had been so extreme as to cause actual prejudice to a degree rendering a fair trial impossible or that the press coverage has 'utterly corrupted' the trial. (Emphasis added.) Murphy v. Florida, 421 U.S. 794, 798, 95 S.Ct. 2031, 2034, 44 L.Ed. 2d 589 (1974). See also Dobbert v. Florida, 432 U.S. 282, 303, 97 S.Ct. 2290, 2303, 53 L.Ed. 2d 344 (1977)." *Martin v. Warden,* 653 F.2d 799, 805 (3d Cir. 1981), *cert. denied,* 454 U.S. 1151 (1982).

The United States District Court for the Western District of Pennsylvania after oral argument and review of the record of both the trial court and the federal magistrate found that Yount had failed to establish "publicity so extreme as to cause actual prejudice rendering a fair trial impossible in Clearfield County, or that the coverage utterly corrupted the judicial process." *Yount v. Patton,* 537 F. Supp. 873, 877 (1982). The District Court further noted that under the teaching of *Sumner v. Mata,* 449 U.S. 539 (1981), the findings of a state court judge as to the impact of pre-trial publicity are to be held presumptively correct. See also 28 U.S.C. §2254 (d).

The law seems well settled that, "Pre-trial publicity exposure will not automatically taint a juror." *United States v. Provenzano,* 620 F.2d 985, 995 (3d Cir., 1980), *cert. denied,* 449 U.S. 899 (1980). *Martin v. Warden,* 653 F.2d 799, 804 (3d Cir., 1981), *cert. denied,* 454 U.S. 1151 (1982). "Even if a juror has heard about a case and has read allegations of a defendant's guilt, the juror nonetheless may serve if he or she is capable of laying aside prior impressions and rendering a fair verdict based on the evidence presented at trial." *United States v. Provenzano,* 620 F.2d 985, 995 (3d Cir., 1980), *cert. denied,* 449 U.S. 899 (1980). See also *Irvin v. Dowd,* 366 U.S. 717, 723 (1961), *Murphy v. Florida,* 421 U.S. 794, 800 (1975).

With regard to the instant case, the record of voir dire at the second trial indicates that of the twelve (12) jurors who actually served on the panel, which heard Yount's case, nine (9) were accepted for the jury by both the Commonwealth and the defense *without challenges of any form* being made. Each one of these nine persons indicated that they had no opinion as to Yount's guilt or innocence. Of the three (3) persons who were challenged, two (2) indicated they had no opinion whatsoever and the remaining one (1), although stating he had an opinion, indicated he would enter the jury box with an open mind and that his verdict would be based on the evidence presented at trial. The voir dire fails to demonstrate the actual existence of such an opinion in the minds of any one of the jurors such as would evidence or bring about the partiality of the panel.

Regardless of the sworn testimony during voir dire, the United States Court of Appeals for the Third Circuit in finding contrary to the Supreme Court of Pennsylvania

and the United States District Court for the Western District of Pennsylvania held that ". . . despite their assurances of impartiality, the jurors could not set aside their opinions and render a verdict based solely on the evidence presented in court. Petitioner has shown that the pretrial publicity caused actual prejudice to a degree rendering a fair trial impossible in Clearfield County." *Yount v. Patton,* Appendix at page 32a. The Court of Appeals, by its holding, is applying the standards originally set forth in *Marshall v. United States,* 360 U.S. 310 (1959). The *Marshall* standard clearly allows for a federal court to find that when persons learn from news sources information with a high potential for prejudice such persons may be presumed to be prejudiced despite their assurance that they could remain impartial. Under the federal system, the representations of the jury members at Yount's trial, even though under oath, may be set aside.

The *Marshall* standard, however, is wholly inapplicable to a state court proceeding. *Murphy v. Florida,* 421 U.S. 794, 798 (1975). *Martin v. Warden,* 653 F.2d 799, 804-805 (3d Cir., 1981), *cert. denied,* 454 U.S. 1151 (1982). Justice Marshall in *Murphy* stated: "In the face of so clear a statement, it cannot be maintained that *Marshall* was a constitutional ruling now applicable, through the Fourteenth Amendment, to the States. . . . We cannot agree that Marshall has any application beyond the federal courts." *Murphy v. Florida,* 421 U.S. 794, 799 (1975).

The decision rendered by the United States Court of Appeals for the Third Circuit is therefore not only contrary to that previously reached by the Supreme Court of Pennsylvania and the United States District Court for the Western District of Pennsylvania but further is contrary to

the holding of this Court in *Murphy v. Florida*, 421 U.S. 794 (1975). The evidence presented as to publicity about the instant case, although indicating that the case was indeed publicized, does not evidence that the publicity was so extreme as to cause actual prejudice or that the publicity utterly corrupted the judicial process such that a fair and impartial jury could not be impaneled. The sworn testimony of the jurors may not be disregarded.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,
Thomas F. Morgan,
District Attorney of
Clearfield County
Counsel for Petitioners

[Note: Appendix omitted, said documents appearing elsewhere herein.]

IN THE SUPREME COURT OF THE UNITED STATES

1983 TERM
No. 83-95

Ernest S. Patton, Superintendent, SCI – Camp Hill, and Harvey Bartle, III, Attorney General of the Commonwealth of Pennsylvania,

Petitioners

v.

Jon E. Yount,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Counsel for respondent,
Jon E. Yount

The respondent, Jon E. Yount, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Third Circuit's opinion of May 10, 1983 in this case.

QUESTIONS PRESENTED

1. Whether publicity before respondent's retrial revealed prejudicial information from his first trial, information that was not officially in evidence against him at retrial, which poisoned the general atmosphere of the community and, therefore, caused an actual prejudice in the jurors that infringed on his ability to select and impanel a fair and impartial jury as required by the Sixth Amendment to the Constitution of the United States. (Answered in the affirmative by the United States Court of Appeals for the Third Circuit).

2. Whether a federal court, in reviewing a state court conviction by way of a habeas corpus petition, may independently evaluate the mixed question of law and fact regarding a veniremen's opinion, and as a result of that independent evaluation, disregard jurors' equivocal assurances of impartiality and find that the defendant was denied a fair and impartial jury as required by the Sixth Amendment to the Constitution of the United States. (Answered in the affirmative by the United States Court of Appeals for the Third Circuit).

3. Whether the United States Court of Appeals for the Third Circuit properly applied to a state court conviction the standards regarding juror prejudice set forth in *Murphy v. Florida*, 421 U.S. 794 (1975). (Respondent respectfully submits the answer to this question to be in the affirmative).

STATEMENT OF THE CASE

On April 28, 1966, the body of Pamela Sue Rimer, an 18-year-old senior at DuBois Area High School, was found shortly after her death in a wooded area near her home in Luthersburg, Clearfield County, Pennsylvania. There were several non-fatal wounds about her head, apparently caused by a blunt instrument, and cuts on her neck, throat and fingers of her left hand caused by a sharp instrument. An autopsy showed that she had died of strangulation when blood from the neck and throat wounds was drawn into her lungs. Except for a stocking, which was tied loosely around her neck, and a shoe, she remained fully clothed; the autopsy revealed no indication that she had been sexually assaulted.

Respondent, Jon E. Yount, surrendered to the Pennsylvania State Police and was arrested on April 29, 1966, on a charge of murder and rape. He was convicted on October 7, 1966, of first-degree murder and rape in the Court of Oyer and Terminer and General Jail Delivery of Clearfield County; the jury pronounced sentence as life imprisonment. The trial court denied post-trial motions; on direct appeal the Pennsylvania Supreme Court determined that respondent had not received adequate warnings against self-incrimination, reversed the judgment of sentence and granted a new trial. *Commonwealth v. Yount*, 435 Pa. 276, 256 A.2d 464 (1969), cert denied, 397 U.S. 925 (1970).

On May 5, 1970, respondent requested a change of venue for retrial claiming that publicity that had

saturated the county since the homicide, the continuing discussion of the case among residents, and the dissemination of prejudicial information outside of evidence was so widespread that prejudice against him could not be eradicated from the minds of potential jurors. The trial court denied the petition for change of venue on September 21, 1970, finding that after the initiation of the appeal the newspapers had merely publicized the actions of the courts "without editorial comment of any kind."

Jury selection for the retrial began on November 4, 1970 and took eleven days, seven jury panels and 1186 pages of testimony. Respondent orally moved for a change of venue following the exhaustion of each panel of jurors; each motion was orally denied by the trial court. On November 13, 1970, a second petition for change of venue was filed by respondent during jury selection; however, the trial court, following a hearing, denied the motion by memorandum and order of the court dated November 14, 1970, stating that "almost all, if not all, jurors seated had no prior or present fixed opinions."

The rape charge against respondent was quashed; retrial for murder began November 17, 1970, and on November 20, 1970, the jury returned a verdict of guilty of murder of the first degree. The trial court denied post-trial motions and the Pennsylvania Supreme Court affirmed the judgment of sentence on direct appeal. *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242 (1974).

On January 5, 1981, respondent filed a petition for writ of habeas corpus in the United States District Court alleging, inter alia, that his conviction had been

obtained in violation of his sixth and fourteenth amendment right to a fair trial by an impartial jury. Following two evidentiary hearings on November 3 and December 28, 1981, the federal magistrate recommended that the petition be granted because respondent had been denied a fair and impartial jury. On April 22, 1982, the district court rejected the magistrate's recommendation and denied the petition. *Yount v. Patton*, 537 F.Supp. 873 (W.D. Pa. 1982).

Respondent filed a notice of appeal with the United States Court of Appeals for the Third Circuit; oral arguments were held on December 17, 1982, and on May 10, 1983, that court held that he had shown that the pretrial publicity caused actual prejudice to a degree rendering a fair trial impossible in Clearfield County, vacated the district court's order and remanded the case to the district court with the direction that a writ of habeas corpus shall issue unless within a reasonable time the Commonwealth affords respondent a new trial.

REASONS WHY THE WRIT SHOULD BE DENIED

The Sixth Amendment to the Constitution of the United States guarantees to the accused the right to be tried "by an impartial jury." Under the Due Process Clause of the Fourteenth Amendment, the states are required to effectuate that right by giving "a fair trial to the accused by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Petitioner attempts to circumvent evidence that pre-

retrial radio, television and newspaper coverage regarding extra-record information had so prejudiced the community of Clearfield County against the accused that a fair trial by an impartial and "indifferent" jury was impossible in that charged atmosphere. The United States Court of Appeals for the Third Circuit, when considering respondent's contention that pretrial publicity had instilled an actual prejudice in the minds of jurors in this case, noted that the exclusion at retrial of information regarding his first trial such as his conviction by a community jury of the murder, his written confessions and trial testimony, his plea of temporary insanity, and his conviction of rape was meaningless when the news media made it available to the public and poisoned the general atmosphere of the community. *See Sheppard v. Maxwell*, 384 U.S. 333, 360 (1966).

The trial court responded to the defendant's allegation that this publicity had prejudiced the jurors against him by stating that "almost all, if not all, [of the first twelve jurors] jurors ... had no prior or present fixed opinions." The Supreme Court of Pennsylvania summarily affirmed this equivocal finding of the trial judge with the general conclusion, absent specific factual findings or references to the record, that "these findings, fully supported by the record, do not sustain appellant's claim ..." and that "the record fails to disclose undue community prejudice." *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242, 247-248 (1974). The state's highest court went on to note, without reference to statistical analysis or specific voir dire testimony, that "neither does the voir dire, as appellant argues, reveal a 'clear and convincing' build-up of prejudice or a 'pattern of deep and bitter prejudice

shown' ... throughout the community which would require a change of venue." The common standards applied by Pennsylvania courts when exercising sound discretion to a request for a change of venue are:

a. Whether pretrial publicity was factual and objective or inflammatory and slanted;

b. Whether pretrial publicity revealed the existence of accused's prior criminal record;

c. Whether pretrial publicity referred to confessions, admissions or reenactments of the crime by defendant;

d. Whether such information was made available by the police and prosecutorial officers; and

e. The extent of saturation and whether a period of "cooling-off" had occurred.

Commonwealth v. Cohen, 413 A.2d 1066, 489 Pa. 167 (1980), cert denied, 101 S.Ct. 118; *Commonwealth v. Frazier*, 369 A.2d 1224, 471 Pa. 121 (1977). However, the record in this case does not indicate that the trial court considered any but the first and last of these standards. The Supreme Court of Pennsylvania failed to provide any insight into how it arrived at its conclusion to affirm the trial court's findings; certainly, there is no evidence that any but the last of these standards was considered. *Commonwealth v. Yount*, 314 A.2d at 247.

Faced with a limited record of factual findings by the state courts, the federal magistrate held two evidentiary hearings on this issue, found that "strong community hostility toward petitioner" existed as well as "pervasive community knowledge of the facts of this case," and concluded that the empanelled jury was in-

capable of deciding the case solely on the evidence before it "but rather at best required the petitioner to prove his innocence or at least overcome strong preconceived notions as to his guilt." The United States District Court refused the magistrate's recommendation. *Yount v. Patton*, 537 F. Supp. 873 (1982).

Because Yount was challenging a state conviction in a petition for writ of habeas corpus, the Court of Appeals, citing this Court's holding that the factual findings of the state courts are presumed to be correct unless shown to be erroneous by convincing evidence, *see Sumner v. Mata*, 449 U.S. 539 (1981), specifically recognized its duty as a federal appellate court to examine the "totality of the circumstances" for any indication that respondent's trial was not fundamentally fair and to "independently evaluate the voir dire testimony of the empanelled jurors and the potential jurors." *See Dobbert v. Florida*, 432 U.S. 282, 303 (1977). The court below not only was permitted by federal law (28 United States Code, Section 2254(d)) to review the mixed question of law and fact presented by the nature of a challenge to a venireman's opinion but was also obligated to conduct an independent evaluation of the record of the case. *Irvin v. Dowd, Warden*, 366 U.S. 717, 723 (1960). *Cuyler v. Sullivan*, 446 U.S. 335, 341-42 (1980).

Upon reviewing the record, the Court of Appeals found that respondent exhausted his peremptory challenges during voir dire; that 126 of 163 veniremen (80%) questioned on the case were willing to admit on voir dire that they would carry their opinion into the jury box; that attempts had been made to veil strong opinions and to influence votes among veniremen; that

the publicity had reached all but one of the twelve jurors and two alternates finally empanelled; that several seated jurors specifically recalled the accused's conviction or confessions, that eight of fourteen jurors would admit that before hearing any testimony they had formed an opinion as to his guilt or innocence, and that jurors gave uncertain and ambiguous answers when asked if they could forget what they had heard and put their opinions aside. The court noted that "even such equivocal assurances of impartiality were preferable to the open admissions of prejudice made by Juror Hrin and the two alternates, who went 'so far as to say that it would take evidence to overcome their belief ... *Murphy*, 421 U.S. at 798."

The court below clearly rejected application of the standards cited in *Marshall v. United States*, 360 U.S. 310 (1959) to this case and dutifully applied the oft-cited requirements of 28 United States Code, Section 2254(d) and *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031 (1974), to its in-depth, independent review of the record. Recognizing the statistical similarity between this "cause celebre" case and *Irvin*, the Court of Appeals noted that "a juror's assurance that he can enter the jury box without an opinion is not dispositive if the accused can demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.' *Murphy*, 421 U.S. at 800;" upon consideration of the extent and content of the publicity because it is indicative of the then-current community pattern of thought, review of the voir dire for opinions expressed by potential jurors and the difficulty encountered in finding veniremen who could at least claim impartiality, and, finally, discovery of a pattern of prejudice reflected in the

testimony of jurors ultimately seated in the jury box, the court concluded that the jurors' assurances of impartiality had to be discounted. The Court of Appeals, responding to the factual findings of the trial court, rejected those findings and held that "petitioner has established that the publicity before his second trial had revealed prejudicial information from his first trial, information which was not officially in evidence against him" and that he "has shown that the pretrial publicity caused actual prejudice to a degree rendering a fair trial impossible in Clearfield County."

Finally, the court below considered the question of law regarding the trial court's refusal to dismiss jurors for cause who had expressed a disqualifying prejudice and concluded that "the trial court refused to dismiss several veniremen who had expressed a disqualifying prejudice and permitted some of them to sit as jurors." Noting respondent's reasons for not challenging for cause nine of the seated jurors, the court held that "where as here a fair trial was impossible not because of a particular juror but regardless of the particular jurors, challenge of any individual juror for cause is not required." However, Judge Garth, concluded that the voir dire testimony of challenged juror, Hrin, demonstrated the actual existence of disqualifying prejudice in the mind of one of the jurors "as will raise the presumption of partiality'..." Judge Garth determined that Juror Hrin's admission of a requirement of evidence to change his preconceived opinion of the defendant's guilt, as a matter of law, raises a presumption of partiality. "A defendant cannot constitutionally be convicted by a jury containing one such juror. *Irvin v. Dowd, supra*, 366 U.S. at 723."

The United States Court of Appeals for the Third Circuit was correct in its conclusion that pretrial publicity poisoned the general atmosphere in Clearfield County so as to create an actual prejudice in the jurors deciding this case that infringed on respondent's ability to select and impanel a fair and impartial jury. The Court was obligated to independently review and evaluate the questions of law and fact relevant to the issue of opinions of veniremen and, if that investigation warranted, disregard the jurors' equivocal assurances of impartiality. In doing so, the court strictly adhered to the standards regarding juror prejudice as set forth in *Murphy*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to review the opinion of the circuit court, should be denied.

Respectfully submitted,

(s) George E. Schumacher
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Attorney for respondent
Jon E. Yount

[Certificate of Service Omitted]

Oct. 24, 1983

SUPREME COURT OF THE UNITED STATES

No. 83-95

Ernest S. Patton, Superintendent, SCI – Camp Hill and Harvey Bartle, III, Attorney General of Pennsylvania,

Petitioners,

v.

Jon E. Yount

ORDER ALLOWING CERTIORARI. Filed *October 17, 1983.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Third Circuit* is granted.